BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center,	**Case Nos.**	**31-RM-209388** **31-RM-209424**
and		
RadNet Management, Inc. d/b/a San Fernando Valley Imaging Center,		
and		
National Union of Healthcare Workers.		

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Place: Los Angeles, California

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of: RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIAL RADIOLOGY AND IMAGING CENTER, and RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY IMAGING CENTER, and NATIONAL UNION OF HEALTHCARE WORKERS.	Case Nos. 31-RM-209388 31-RM-209424

The above-entitled matter came on for hearing, pursuant to notice, before **SARAH C. INGEBRITSEN**, Hearing Officer, National Labor Relations Board, Region 31, at the 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064, on **Monday**, **January 29, 2018, 9:28 a.m.**

A P P E A R A N C E S

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Nelson Beltran	60				
Sophia Mendoza	65				

E X H I B I T S

EXHIBIT	IDENTIFIED	IN EVIDENCE
Board:		
B-1(a) through (m)	8	8
Employer:		
E-2	27	27
E-3	26	26
E-4	27	32
E-5	70	82

P R O C E E D I N G S

HEARING OFFICER INGEBRITSEN: Okay. This hearing will be in order. This is a hearing before the National Labor Relations Board in the matter of 31-RM-209424 and 31-RM-209388, pursuant to an order of the Regional Director dated January 12th, 2018. The Hearing conductor (sic) conducting the hearing is Sarah Ingebritsen. The official reporter makes the only official transcript of these proceedings, and all citations and briefs and arguments must refer to the official record.

In the event that any of the parties wish to make off-the-record remarks, a request to make such remarks must be directed to the Hearing Officer and not the official reporter. Statements of reason and supportive motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, upon appropriate request, be permitted to an entire line of questioning.

It appears from the Regional Director's orders dated January 12th, 2018 that this hearing is held for the purpose of taking evidence concerning an objection to the election conducted on December 6th, 2017 at the Employer's Encino location, and conducted on December 8th, 2017 at the Employer's Panorama location -- Panorama City location. The specific objections that this hearing concerns are objection 2 in the Employer's objections to the December 6th, 2017 election, and

objection 2 in the Employer's objection to the December 8th, 2017 election.

The parties have been advised that the hearing will continue from day-to-day as necessary until completed, unless the regional director concludes that extraordinary circumstances warrant otherwise. The parties have been advised that upon request, they are entitled to a reasonable period, at the closing of hearings, for closing arguments. Briefs are allowed only by special permission within the time and addressing the subject permitted by me as Hearing Officer.

Please be aware that parking -- that the party seeking to challenge the results of the election bears the burden of proof. You must present specific detailed evidence in support of your position. General, conclusionary statements by witnesses will not be sufficient.

In due course, I will prepare and file with the Regional Director my report and recommendations in the proceeding, and will cause a copy thereof to be serviced on each of the parties. The procedure to be followed from that point forward is set forth in Section 102.69 of the Rules and Regulations.

Will counsel and any other representatives for the parties please state their appearances for the record.

MS. KASETA: Yes. Kaitlin Kaseta for the Employers, RadNet Management, Inc. doing business as San Fernando Interventional Radiology and Imaging Center, and RadNet

Management, Inc. doing business as San Fernando Advanced Imaging Center.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. HOFFMAN: Florice Hoffman for the National Union of Healthcare Workers.

HEARING OFFICER INGEBRITSEN: Thank you. Are there any other appearances? Let the record reflect no further responses.

I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1(a) through 1(m), inclusive. Exhibit 1(m) being an index and description of the entire exhibit. The exhibit has already been shown to all of the parties. Are there any objections?

MS. KASETA: I have no objection on behalf of the Employers. I will note that for some reason on the service sheets that are put out by Region 31, improperly identify it as Kaitlin Kaseta, Law Offices of Don T. Carmody. It should be Kaitlin Kaseta, Carmody and Carmody, LLP.

HEARING OFFICER INGEBRITSEN: Noted.

MS. KASETA: Other than that, there's -- I have no objection to the papers.

HEARING OFFICER INGEBRITSEN: Okay. Okay.

Any objection for the Union?

MS. HOFFMAN: No objection.

HEARING OFFICER INGEBRITSEN: Thank you. Hearing no

objection, the formal papers are received into evidence.

(Board Exhibit Number 1(a) through 1(m) Received into Evidence)

HEARING OFFICER INGEBRITSEN: The reasons for the hearing are set forth in the notice, and those are the objections numbered as objection 2 in each respective case as filed by the Employer. Would the parties please briefly state their position as the point of the objections filed by the Employer?

And Employer, if you could please start.

MS. KASETA: Sure. So the Employers in these two cases, and I'll address them both together because it's, essentially, the material of the objections are the same. The objection is raised to conduct during the organizing campaign relating to police reports that were filed involving certain employees and facilities operated by RadNet Management, Inc. Though they were not the facilities at which the elections took place, specifically San Fernando Interventional or San Fernando Advanced. They were other facilities that were part of the Union's organizing campaign and part of the original petition that was filed by the Union.

There is a concern on the part of the Employers that these police reports, whether they were filed -- regardless of who they were filed by, but particularly, if they were filed by the Union or an agent of the Union, were intimidating and harassing, not only for the employees who were subjected to these police reports, which were, in their nature, false, but

also, for those employees at the two sites that elections were held at. That employees may have heard about these police reports that were being filed, and that they may have been subjected to intimidation or harassment or coercion as a result of knowing about the police reports and speculation that might have been swirling about why the police reports were filed or by whom.

So the purpose, as the Employer sees it, is to get to the bottom, first of all, of who's responsible for these police reports, which is a shared obligation not only of the Employer, but also the Board. And also, to determine whether or not employees were coerced, intimidated, harassed, or threatened when exercising their rights in voting in the elections at San Fernand Interventional and San Fernando Advanced.

HEARING OFFICER INGEBRITSEN: Anything further?

MS. KASETA: No.

HEARING OFFICER INGEBRITSEN: Okay. Thank you.

Would the Union please state its position on the record as to these objections?

MS. HOFFMAN: The Union has -- is waiting for the Employer to establish that the Union was, in any way, involved with these police reports, and also, we do not understand how even the filing of police reports at other locations had an effect on these two locations. So we don't think that there's actually -- there was sufficient evidence to actually for

objection number 2, but we'll wait to give our opening statement on the actual facts until we hear the Employer's case.

HEARING OFFICER INGEBRITSEN: Okay. Thank you. So at this time, I will entertain motions or issues that the parties wish to raise prior to the beginning of witness testimony. It's my understanding that there are some issues regarding subpoenas that were issued. Employer, could you please inform us of any subpoenas that you issued or the outstanding subpoena issues that you'd like to raise?

MS. KASETA: Sure. So there were -- so there are two employers in this case. So a duplicate set of subpoenas, issued by each Employer, was issued to each of these entities.

HEARING OFFICER INGEBRITSEN: Uh-huh.

MS. KASETA: Of course, NUHW is here today. We've spoken off the record to some extent about the subpoenas that were sent to them. But to be clear on the record, there were a total of eight subpoenas that were served on NUHW. Four of them were served on the custodian of records, two of those were subpoenas ad testificandum and two of them were subpoenas duces tecum. Four of them were served on Sophia Mendoza personally, and there were two subpoenas, ad testificandum and two subpoenas duces tecum. So it's a --

HEARING OFFICER INGEBRITSEN: For each Employer?

MS. KASETA: Right.

HEARING OFFICER INGEBRITSEN: Okay. And is the Sophia Mendoza --

MS. KASETA: I'm sorry, to be clear, it's a total of eight. Each Employer served four.

HEARING OFFICER INGEBRITSEN: I see. Okay. Thank you. Thank you.

So I know we've discussed briefly, off the record, some of the issues with the subpoena for the custodian of records. Before we dive into that issue, can we address the subpoena to Sophia Mendoza?

MS. KASETA: Sure. It might even make sense for me to give you an overview of the other subpoenas that were issued and haven't yet been responded to. It doesn't appear there's any parties here --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- those parties are here. There were, in a similar fashion, there were a total of eight subpoenas that were served on the International Association of Machinists and Aerospace Workers, District Lodge Number 725. Two ad testificandum to the custodian of records, two duces tecum to the custodian of records. I'm sorry -- I don't know if you're --

HEARING OFFICER INGEBRITSEN: Switching. I'm switching, too.

MS. KASETA: No problem. Let me know when you're ready.

HEARING OFFICER INGEBRITSEN: Thank you. Go ahead.

MS. KASETA: Two ad testificandum to Ryan Carrillo and two duces tecum to Ryan Carrillo. And then, there were a total of four subpoenas served on the Los Angeles Police Department custodian of records; two ad testificandum and two duces tecum.

HEARING OFFICER INGEBRITSEN: And when were these subpoenas served on the parties?

MS. KASETA: Friday, January 26th. A courtesy copy was sent to Ryan Carrillo on behalf of IAMAW on Thursday the 25th.

MS. HOFFMAN: And where was it?

MS. KASETA: To the email address for him with the IAMAW, which I can give to you. Give me just one second. Rcarrillo, which is spelled C-A-R-R-I-L-L-O, @IAM725.org.

HEARING OFFICER INGEBRITSEN: And it appears that as of the moment no one is here responsive to those subpoenas.

MS. KASETA: Right.

HEARING OFFICER INGEBRITSEN: I would propose that we move forward with what evidence we can put on, and make a determination as to -- and you can make a determination as to what extent it's still necessary for you to put on your case after that evidence. Is that something that --

MS. KASETA: I think I need the subpoenaed documents in order to present my case.

HEARING OFFICER INGEBRITSEN: For all of the outstanding subpoenas; is that correct?

MS. KASETA: Yeah. I mean, on the assumption that there may or may not be relevant evidence contained in them, I do believe I would need them. For example, I don't know who to question until I have the police reports from the LAPD, which they, despite our continued efforts to obtain those from them through an informal process, we've been unable to do so. So I need the subpoenaed police reports to determine my next steps.

Additionally, in terms of, you know, the documents that the Union would have, and they said they have no responsive documents, but I don't know what this other union, who we believe there's an affiliation between the two unions, may have been acting as an agent of NUHW. So I need to know if that's the case because all of that will establish whether or not there was any interrogation or harassment or, you know, intimidation of employees with -- in connection with the police reports.

HEARING OFFICER INGEBRITSEN: And what is your basis for belief that there is an association between the other union and the Union at issue here?

MS. KASETA: The basis for that is, and I could -- this objection was overruled, so I don't want to get in the evidence too much. But as the offer of proof set forth, there's evidence that the two organizations participate in joint training sessions, joint organizer training sessions. Also, it appeared that an individual who was representing himself as a

member or organizer with IAMAW, attended all of the vote counts that were held, including the vote counts at San Fernando Interventional and San Fernando Advanced. And that's Ryan Carrillo.

HEARING OFFICER INGEBRITSEN: Ms. Hoffman, I know you are not a representative of the other union, but because this subpoena deals with a connection between -- a potential connection between these two unions, would you like to respond at all?

MS. HOFFMAN: Well, first of all, the Machinist and the NUHW are not affiliated in any formal way. And I believe they're all affiliated through the L.A. County Labor Fed, which would be affiliating all unions that are all part of the labor movement, which is legally not an affiliation.

But as far as Mr. Carrillo, it's our understanding that he wasn't properly served and he has five days to do a petition to revoke. And this -- these objections were pending for more than a week. So I don't really understand why the Employer waited until Friday to serve the subpoenas for Monday since they've had these objections -- the objections were sent out to us on the 12th. So January 12th; is that right?

HEARING OFFICER INGEBRITSEN: That is when the order went out. That's correct.

MS. HOFFMAN: So I don't know why they waited so long to serve a subpoena for -- on Mr. Carrillo. Again, as far as, and

since I'm not a representative of the machinists, I don't know what their position is on this. So as far -- I mean, we could try to contact Mr. Carrillo and see if he would voluntarily come. I don't know if he will or he won't. But we think that the Employer has the burden to move forward. I don't know when they served the subpoenas on LAPD to get police reports either.

And if they had knowledge of these police reports, do the individuals that they say that they were filed against the facilities. Don't they have some kind of right to have copies of them? Or the individuals that they're saying that there are police reports? I mean, I think they could move forward with whatever they have without these subpoenas. Because first of all, I don't even understand what their case is, so.

HEARING OFFICER INGEBRITSEN: Okay. Ms. Kaseta, I'm going to ask you to -- I know you had given me a list of the subpoenas that you had issued. I'm going to go through them one-by-one, just to get a statement from you regarding the relevancy of each.

MS. KASETA: Uh-huh.

HEARING OFFICER INGEBRITSEN: And then, I will either make my ruling on -- well, there are no motions to revoke, so I won't make a ruling. But we will determine how we are going to move forward.

So regarding the IMAMAW; is that correct?

MS. KASETA: IAMAW.

HEARING OFFICER INGEBRITSEN: Okay. Thank you. Could you -- and I believe those are duces tecum, or are they also ad testificandum?

MS. KASETA: They're both.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: So there's a -- for the purpose, just assume that anything I say I mean in duplicate for both Employers.

HEARING OFFICER INGEBRITSEN: Okay. Understood.

MS. KASETA: Each Employer received one of these -- served one of these.

HEARING OFFICER INGEBRITSEN: Uh-huh.

MS. KASETA: There was an ad testificandum to the custodian of records --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- for IAMAW.

HEARING OFFICER INGEBRITSEN: And the relevancy of that testimony --

MS. KASETA: Would relate to the documents that were requested as part of the ad -- the duces tecum to the custodian of records.

HEARING OFFICER INGEBRITSEN: Okay. And then, the duces tecum, what is the relevancy of the documents requested?

MS. KASETA: Similarly, to the subpoena duces tecum that was served on NUHW, and I do intend to enter copies of all these into evidence. I don't know if you want to do that now

or have me do it through the courier who served them because he would be the right person to establish service. But it's a similar subpoena in nature to the one that was served on NUHW. It is requesting information about communications between the two unions related to these police reports, if any. The communications between any agent of IAMAW and the Los Angeles Police Department, if any.

And communications between any agent of the IAMAW and employees of the San Fernando Valley. The Employers are all part of a corporate structure that has other sites that were originally being organized by the Union. Petitions for elections were later withdrawn, but for a period of time, there were a number of sites that were involved in the Union's organizing campaign.

The relevance of those documents would be to establish whether or not any employees at San Fernando Interventional or San Fernando Advanced were targeted by either union or an agent of either union for police reports themselves. Or whether they were told anything about these police reports by agents of either union. So even if it's the case that the Union itself, or IAMAW didn't file the police reports, it would be sufficient if either of those Unions communicated to employees either that RadNet was responsible for doing that as an intimidation or coercion of employees, or that the Unions were responsible for doing that as an intimidation or coercion of employees.

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: Can I respond?

HEARING OFFICER INGEBRITSEN: You may.

MS. HOFFMAN: The NUHW did respond to the subpoenas that had similar requests. And we have no emails or text messages or any communications with anyone from the International Association of Machinists, including Ryan, about police reports, or intimidating anyone with police reports. There are no such -- there is no such evidence. So I don't really see how the machinists would have something separately, but there's nothing between the machinists and NUHW or NUHW regarding police reports or the filing of police reports or harassing anyone with police reports.

MS. KASETA: I understand that NUHW has responded to the subpoena and that they represent that they don't have any responsive documents. But I'm asking for a response from the IAMAW, which is a separate category of documents, potentially. There might be overlap, and I'm not suggesting that there's been any misrepresentation by NUHW, but there might be documents that were deleted by one party and not by the other. There might be documents that involve only one party and not the other.

With regard to -- I would move next to the LAPD subpoena. And that subpoena, when I enter it into the record I'm going to ask for a protective order or that certain information be

redacted from that subpoena. That subpoena is seeking, with regard to all of the employees and facilities where police reports were filed and the police arrived at the location and said that someone had, you know, called in some kind of issue. We've asked for copies of any and all documentation, essentially, that relate to those called in complaints or issues, including copies of any reports, phone logs, et cetera.

We have been trying to work with the Los Angeles Police Department on informal basis since about December 12th of 2017. We've been told and, in fact, the individual employees in the centers have been told that they don't have a right to information about who filed the police reports or, you know, what existed. I do think, certainly, that they should be entitled to them. I would agree with counsel for the Union on that point. But thus far, hasn't been a particularly cooperative process, which is why we had to issue the subpoena.

HEARING OFFICER INGEBRITSEN: Okay.

Counsel for the Union, do you have a response to that?

MS. HOFFMAN: We don't know anything about it.

HEARING OFFICER INGEBRITSEN: Fair enough.

MS. HOFFMAN: So it's very hard for me to respond.

HEARING OFFICER INGEBRITSEN: And I understand that you're not the party subpoenaed.

MS. HOFFMAN: Right.

HEARING OFFICER INGEBRITSEN: I just want to make sure we

have a complete record. And so I'm including everyone.

MS. HOFFMAN: My only response is that it seems that the entire objection is purely speculative if there's no documentation of anything.

HEARING OFFICER INGEBRITSEN: Okay. So I understand that there are many outstanding subpoenas. The subpoenas that we can deal with now are the ones issued to the National Union of Healthcare Workers. Can we please discuss, on the record that subpoena and any outstanding issues with that subpoena that we have at this time?

MS. KASETA: Sure. It's a total of eight subpoenas. What I think might make sense is to give everybody a copy, and then we can talk about how to -- how we're to enter them into evidence. I'll mark them, for now, as Employer's 1.

MS. HOFFMAN: Oh, okay. We only have four. So I don't know --

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: We only have two and two, so I don't know.

MS. KASETA: Maybe, if you don't mind, when I come over there I'll take a quick look and make sure that we're looking at the same thing.

MS. HOFFMAN: Okay.

MS. KASETA: The ad testificandums are, you know, very short. They're just like one-pagers --

MS. HOFFMAN: Maybe --

MS. KASETA: -- with the money orders attached.

MS. HOFFMAN: -- maybe there are eight.

MS. KASETA: I'm happy to look with you or --

MS. HOFFMAN: Okay. It looks like there are eight.

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: Just a question for clarification.

MS. KASETA: Sure.

HEARING OFFICER INGEBRITSEN: It looks like there are some directed to Sophia Mendoza in here as well. Is that inclusive --

MS. KASETA: Right. There were a total of four that went to Sophia Mendoza, an ad testificandum and a duces tecum for Mendoza from each employer. And an ad testificandum and a duces tecum for the custodian of records for each. So --

HEARING OFFICER INGEBRITSEN: Understood.

MS. KASETA: -- the reality of it is we're really just talking about an ad testificandum and duces tecum to the custodian of records, and an ad testificandum and duces tecum to Ms. Mendoza. It's just that there's two employers.

HEARING OFFICER INGEBRITSEN: Yes. Understood.

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. KASETA: So it's a big stack, but in terms of the -- and if Ms. Mendoza is the custodian of records, we're really

just talking down to two --

HEARING OFFICER INGEBRITSEN: Two. Yeah.

MS. HOFFMAN: Well, she's an officer of the Union, so.

HEARING OFFICER INGEBRITSEN: Okay. Okay. And it's my understanding that the parties have gone through one of the subpoenas, one of the duces tecum, and addressed most of the issues. Can we go to that subpoena right now?

MS. KASETA: Sure. I mean, we could look at B-1ZPBAFR.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: It's the first duces tecum in this pile.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: So there's four ad testificandums and then a duces tecum.

MS. HOFFMAN: Which one?

MS. KASETA: B-1-ZPB8FR.

MS. HOFFMAN: Okay.

MS. KASETA: Okay. So -- and I can represent on the record that the set of requests contained in this subpoena, they're the same set of requests as contained in B-1ZPBFG9, which is the other subpoena that went to the custodian of the records. I think we should do -- we should address on the record the responses to this subpoena and then Ms. Mendoza's responses to the subpoenas that were issued to her separately, just for clarity.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: I understand the answers are the same, but --

HEARING OFFICER INGEBRITSEN: Okay. And you know, for the purpose of not burdening this record too much, I'm going to request that we make a separate subpoena record to address these issues. Can we do that? Okay.

MS. KASETA: I'm not sure I understand what the implication of that would be.

HEARING OFFICER INGEBRITSEN: So normally -- sometimes, if there is an issue with a subpoena where we would have to go into a lot of depth, we make a separate record on the -- basically, on the side. It's still all on the record, just relating to the subpoena.

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: It doesn't --

MS. KASETA: As long as it's on the record and will remain a part of the case --

HEARING OFFICER INGEBRITSEN: Yes.

MS. KASETA: -- I have no objection to that.

HEARING OFFICER INGEBRITSEN: Any objection from the Union?

MS. HOFFMAN: No.

HEARING OFFICER INGEBRITSEN: Okay.

(Off the record at 9:56 a.m.)

HEARING OFFICER INGEBRITSEN: Okay. I am resuming the hearing record to discuss how we will proceed with the subpoena

issues and the presentation of evidence. Employer's counsel has stated that they are prepared to present evidence regarding the service of the subpoenas and testimony regarding the custodian of records for the Union, but no other evidence at this time that is outstanding -- that is not included in the subpoena requests that are currently outstanding.

Employer, is that correct?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: The Employer -- the Union has stated their position regarding this on the subpoena record. At this time, I'm going to take a brief recess off of the record to determine how to move forward. So I'm just going to take a brief recess, and then we'll come back and figure out how to go forward.

(Off the record at 10:24 a.m.)

HEARING OFFICER INGEBRITSEN: Regarding the outstanding subpoenas, I'd like to enter into the record the rest of the subpoenas that you have been served, and the proof of --

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: -- service so that I can make determinations on them.

MS. KASETA: Well, are we on the record right now?

HEARING OFFICER INGEBRITSEN: We are.

MS. KASETA: Okay. Then I would like to ask on the record how you would make a determination where petitions to revoke

haven't been filed?

HEARING OFFICER INGEBRITSEN: Well, it is up to the Board to -- when a subpoena has not been complied with, to determine whether to move forward with -- I'm sorry, I'm blanking on the term -- enforcement --

MS. KASETA: Enforcement proceedings in the local district court.

HEARING OFFICER INGEBRITSEN: Thank you very much, yes.

MS. KASETA: Right.

HEARING OFFICER INGEBRITSEN: So it's the Board that pursues those and so it would be my recommendation whether or not to pursue the enforcement.

MS. KASETA: Okay. I was going to request enforcement, but --

HEARING OFFICER INGEBRITSEN: Okay. So --

MS. KASETA: Right. So you are going to need them anyway.

HEARING OFFICER INGEBRITSEN: Um-hum.

MS. KASETA: Let me just make sure I've got like, enough of everything here.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. KASETA: This is the full set for IAMAW, Employer's Exhibit 3 is the full set for IA.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Actually, I'm just short a paperclip, so -- oh, sorry --

HEARING OFFICER INGEBRITSEN: And I would just like to note that I believe, as of now, we do not have this on the record, so we -- yeah --

MS. KASETA: Yeah, that's the set -- full set of the --

HEARING OFFICER INGEBRITSEN: Yeah. Yeah.

MS. KASETA: -- the certification service, so that's going to be what you just asked for.

HEARING OFFICER INGEBRITSEN: Okay. Counsel for the Employer, do you have any objection to entering these subpoenas into the record for the purpose of determining subpoena enforcement?

MS. KASETA: No, I'm the Employer.

HEARING OFFICER INGEBRITSEN: Oh, I'm sorry --

MS. KASETA: And I don't.

HEARING OFFICER INGEBRITSEN: -- counsel for the Union.

MS. HOFFMAN: No. No objections.

HEARING OFFICER INGEBRITSEN: No objections, okay. Hearing no objections, I enter Employer Exhibit 3 into the record.

(Employer Exhibit Number 3 Received into Evidence)

MS. KASETA: For Employer 2, I want it under a protective order because it has personally identifying information for the complaining employees.

HEARING OFFICER INGEBRITSEN: Counsel for the Union --

MS. KASETA: Oh, I'm sorry, not for -- did I say Employer

Exhibit 2?

HEARING OFFICER INGEBRITSEN: Yes, you did.

MS. KASETA: I'm sorry, Employer Exhibit 2 is good and I would move it in because it's the certification -- the service for all of the subpoenas.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: But I'm sorry, I should have -- I was talking about Employer Exhibit 4, what I'm going to mark as Employer Exhibit 4. That's the subpoenas for -- that were issued to LAPD, and I would like those under a protective order.

(Employer Exhibit Number 4 Marked for Identification)

HEARING OFFICER INGEBRITSEN: Okay. Let's deal with the Employer Exhibit 2 first. Counsel for the Union, is there any objection to entering Employer Exhibit 2 into the record?

MS. HOFFMAN: You said 2?

HEARING OFFICER INGEBRITSEN: Yes.

MS. HOFFMAN: Okay. Oh, 2 is what? Oh, the proof of service?

HEARING OFFICER INGEBRITSEN: 2 are the proof of service.

MS. HOFFMAN: No objections.

HEARING OFFICER INGEBRITSEN: Okay. Hearing no objections, I enter Employer Exhibit 2 into the record.

(Employer Exhibit Number 2 Received into Evidence)

MS. KASETA: Okay, so what would be marked as Employer Exhibit 4, I want the information protected -- or I want to

leave to make copies that have redacted personally identifying employee information.

HEARING OFFICER INGEBRITSEN: Okay. Counsel for the Union, what's your position on the protective order -- or redacted copies?

MS. HOFFMAN: Well, the Employer has the burden of proof, and it was my understanding that we were going to have a hearing today and that these employees were going testify from what was an objection too, but I don't -- it doesn't matter to me if they're redacted or not. But I would assume that at some point, if we're going actually have a hearing on this, we will have to know who the employees are.

HEARING OFFICER INGEBRITSEN: Um-hum.

MS. HOFFMAN: Because we would have the right to cross-examine witnesses too. I mean --

HEARING OFFICER INGEBRITSEN: Understood.

MS. HOFFMAN: -- you can't say that employees were harassed and intimidated and that they had -- the Union engaged in certain activity if we don't even have the right to cross-examine those witnesses because I don't know -- first of all, I don't know if police reports were filed. I don't know what the circumstances were, and I would assume that I would get -- the documents don't speak for themselves because I don't know if there was actually some kind of dispute that would have resulted in someone other than the Union, or whoever, filing a

police report. So I don't know if they're false or not.

HEARING OFFICER INGEBRITSEN: Understood. Okay. So I have no objection to entering a redacted version of your exhibits, redacting only the employee addresses, into the record.

MS. KASETA: Okay. I don't have a problem with that, I just don't have those prepared. The copies I have are not redacted.

HEARING OFFICER INGEBRITSEN: Okay. Is there --

MS. KASETA: So I would need leave to do that.

HEARING OFFICER INGEBRITSEN: Okay. Can we take a five minute recess, ten minute recess, to redact those copies?

MS. KASETA: Can I suggest this? Can I suggest that you accept it as marked for the moment? And then if -- because it's my understanding that you think that the Region possesses the power to make a ruling on these subpoenas. For the record, I don't agree with that. I understand your power to enforce subpoenas issued by the Board --

HEARING OFFICER INGEBRITSEN: Um-hum.

MS. KASETA: I think that's a distinct matter from sua sponte raising your own -- essentially what is your own petition to revoke. But if your sole purpose in having these documents is so that you can take them back and rule on your own unilateral petition to revoke, then I don't have a problem with giving you a copy of what's been marked as Employer's 4,

that's unredacted, for that sole purpose because I'm not concerned that in making that ruling there's going to be any implication of the employees who are named or whose addresses are included.

HEARING OFFICER INGEBRITSEN: Well, like you said, I don't intend to make a ruling on a motion that does not exist, but I do intend to make a determination as to whether to move forward with enforcement before or after the presentation of evidence in this hearing regarding these subpoenas.

MS. KASETA: Okay. It's hard for me to see how those aren't necessarily one and the same, where you're saying that that will be the -- essentially the basis for a decision whether or not to leave this record open to get more evidence from the individuals who were subpoenaed. What's the practical difference between you ruling on a nonexistent petition to revoke and you saying, well we're not going to enforce it and therefore, we can close this record?

HEARING OFFICER INGEBRITSEN: Well, it's a difference in -- because we are not making a ruling on a motion, we are determining whether we move forward. And I understand that you don't see -- there's not -- in your view, there's not a distinct difference between the outcomes of those differences, but there is a difference in terms of the process.

MS. KASETA: Yet, there's no practical difference in terms of the process either because the bottom line is I will be

precluded from getting information from these subpoenas by a ruling made by this Region. But you can do what you want. What do you want to do about Employer's Exhibit 4?

HEARING OFFICER INGEBRITSEN: So you do not have a redacted --

MS. KASETA: No, I could redact, but it's going to take a little while, just because I've got to go through the various copies and get like a --

HEARING OFFICER INGEBRITSEN: Okay. How long do you think that would take you to redact?

MS. KASETA: It's really only one page that's going to have redactions on each page. It's going to be one -- if I did one, could you make copies for me of the redacted set?

HEARING OFFICER INGEBRITSEN: I could do that.

MS. KASETA: Then, yeah, it would take a mere minute if you have, like, some whiteout tape that I can use.

HEARING OFFICER INGEBRITSEN: Okay. Let's go off the record to prepare those documents.

(Off the record at 10:55 a.m.)

MS. KASETA: One second, I want to just make sure I have --

HEARING OFFICER INGEBRITSEN: Off the record?

MS. KASETA: Sorry, because --

(Off the record at 11:08 a.m.)

HEARING OFFICER INGEBRITSEN: I want to clarify, from here

on out, we will be on a single hearing record.

MS. KASETA: Okay. I have copies of a redacted Employer's Exhibit 4.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. KASETA: I apologize that I don't have easy access to paperclips for everyone.

HEARING OFFICER INGEBRITSEN: Okay. Counsel for the Employer, is there any objection to entering Exhibit 4 -- Employer's Exhibit 4 into the record?

MS. KASETA: No.

HEARING OFFICER INGEBRITSEN: Counsel for the Union, is there any objection?

MS. HOFFMAN: No.

HEARING OFFICER INGEBRITSEN: Okay. All right. Upon review and hearing no objections, I enter Employer Exhibit 4 into the record.

(Employer Exhibit Number 4 Received into Evidence)

HEARING OFFICER INGEBRITSEN: Counsel, is this the extent of your outstanding subpoenas, or are there more subpoenas that are outstanding?

MS. KASETA: These are the subpoenas that are currently outstanding. I mentioned off the record, the receipt of responsive documents from NUHW may require the Employers to request -- I might actually have enough subpoenas -- but either request or issue new subpoenas. Not to NUHW, who I understand

to have represented that they've already searched all their records, but potentially to individuals or the Los Angeles police department.

HEARING OFFICER INGEBRITSEN: Okay. Understood. So at this point, in the interest of moving forward, conduct aside -- who engaged in the conduct aside, the issue -- what matters here is the effect of conduct on Union employees. There must be a showing that the employees who were voting at these two locations at issue were actually aware of what conduct occurred in order for them to be affected by it.

So counsel for the Employer, I'm going to ask on the record what your offer of proof is for dissemination -- employee dissemination to the two locations at issue here?

MS. KASETA: And I would state on the record that I'm not in a position to give an offer of proof on that at the moment because of the fact that I'm not in receipt of the documents that I requested. The documents that I requested are relevant to the question of whether employees at San Fernando Interventional or San Fernando Advanced were told by either of the Unions, or any volunteer agent, et cetera, who worked for them, that there were these police reports and/or that they came from X source, and I don't have the documents yet. I'm not obligated to be able to -- I don't have to sustain that on a certain individual's testimony, nor do I think it's necessarily indicative that the objection should be overruled

that I wouldn't call an employee to testify if they're -- you're talking about an issue of coercion, the best source of evidence would be if there are any existing documents that illustrate that, or if there were parties engaged in that, that I would call them. And that's why we've asked for the subpoenas.

HEARING OFFICER INGEBRITSEN: And to be clear, none of your outstanding subpoenas are for employees at either of the two locations in interest -- or at issue; is that correct?

MS. KASETA: I am not subpoenaing individuals from those sites, however, I am subpoenaing documents that could be received by, or sent from, employees of those sites.

HEARING OFFICER INGEBRITSEN: Okay. So your offer of proof as to dissemination would be the documents requested by the -- from the Union about communication between Union employees and -- or, I'm sorry -- Union -- yes, Union employees and employees at these two specific locations; is that correct?

MS. KASETA: Yeah, I've requested documents not just from NUHW, but also IAMAW, that are relevant to that inquiry. And I understand the Regional Director's position that that's the inquiry related to this objection that's set for hearing today.

I disagree with the regional director's assertion as made in her decision that it's irrelevant who is responsible for the conduct and the filing of police reports. I believe the Board's own guidance requires the Board, in situations where

it's apprised of potential violations of other state or federal statutes, to investigate or refer those matters as necessary, and I don't believe the board has done that here; that this Region has done that here, and I would intend still to attempt to produce that evidence as well.

HEARING OFFICER INGEBRITSEN: Okay. Understood. So to be clear, other than the outstanding subpoena requests, you are not prepared at this point in the hearing, to put on any evidence regarding the dissemination, nor any direct evidence regarding the events that occurred -- the conduct that occurred.

MS. KASETA: At this point in time, without receipt of the documents to which I'm entitled, I am not going to put on that evidence. That is not to say that I would not be able to do so in the future if I determined that it was going to be relevant to the question in this hearing based upon the documents I reviewed.

HEARING OFFICER INGEBRITSEN: Okay. Counsel for the Union, do you have a response?

MS. HOFFMAN: In support of objection to the Employer proffer that it would call three site managers and two employees who work at other facilities operated by the Employer to testify that during the course of the Union's organizing campaign, they each voiced opposition to the Union's organizing campaign, and/or refused to engage with the Union, that as a

result, false police reports were filed against them. The Employer then set forth some specific instances and it's in support of objection number 2. Now the Employer is not putting on the proffered proof. It is my understanding that the subpoenas were intended to corroborate the witness's testimony that the Employer proffered. So now, the Employer has turned it upside down and says that they're not going even have these -- the proffered witnesses that were a basis for these objections until they get the documentary evidence from the police and the other -- and the Union's involvement.

Once again, it's the Union's position that they had no involvement in this; we don't have any record of this. And I'm not even sure what these allegations are, but it's the Employer that has the burden of proof, and it has said that it would provide these witnesses in support of objection number 2. So the Union believes that based on its face, that the Employer does not have the evidence that it said that it would proffer and that this objection should be overruled.

MS. KASETA: May I respond, please?

HEARING OFFICER INGEBRITSEN: You may.

MS. KASETA: The offer of proof was submitted in conjunction with the objections. Those were submitted before the Regional Director made the determination in this case that the relevant matter wasn't going to be the fact that the police reports were filed, which is what the witnesses we named in our

offer of proof could testify about. They could testify about their own opinions about union representation, and they could testify about the police reports that were filed. That evidence wouldn't go directly to the question of, were employees at San Fernando Interventional and San Fernando Advanced going to be influenced by the occurrences of this activity? That information needs to be developed in these -- by way of the documents sought in these subpoenas.

And I want to point out that this Employer acknowledged that having to involve the Los Angeles police department would take some time. And we asked for an extension of time to further develop this proof, and that was denied. So the reason we're here today, and the reason that we don't have the documents yet is in part because we were not afforded a sufficient amount of time to gather that -- those documents with a large, and very bureaucratic, government agency.

HEARING OFFICER INGEBRITSEN: Okay. Understood. So Counsel for the Employer, you are not prepared at this time to call the site managers and the employees as stated in your objections; is that correct?

MS. KASETA: I could call them as stated in my objections, but the evidence wouldn't be relevant to the question that was set for hearing by the Regional Director.

HEARING OFFICER INGEBRITSEN: Okay. Understood. All right, Counsel for the Employer, let's go through -- starting

with Employer Exhibit 3, I believe that Employer Exhibit 2 are the subpoenas issued on the Union; is that correct?

MS. KASETA: Employer 1 is the subpoenas for the Union --

HEARING OFFICER INGEBRITSEN: Oh, and 2 is --

MS. KASETA: -- Employer 2 is all the return of service.

HEARING OFFICER INGEBRITSEN: Okay. So let's start with Exhibit 3.

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: You have subpoena A-1-ZP9NBN, directed to the custodian of records --

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: -- for IAMAW, local district lodge 725. Could you please give a brief offer of proof as to what this subpoenaed information or testimony would show?

MS. KASETA: The documents have been subpoenaed and are relevant because they -- well, this a subpoena ad testificandum so --

HEARING OFFICER INGEBRITSEN: Um-hum.

MS. KASETA: -- I'd like the opportunity to question the custodian of records about the production of documents in response to the subpoena duces tecum --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- in essence. Depending on who the custodian of records is, I might have questions about their relationship with NUHW as well.

HEARING OFFICER INGEBRITSEN: And is there -- the subpoena duces tecum that relates to this, could you please direct me to that in Employer Exhibit 3?

MS. KASETA: Sure. So the answer that I just gave with regard to the relevance of A-1-ZP9NBN --

HEARING OFFICER INGEBRITSEN: Um-hum.

MS. KASETA: -- applies to the other three subpoenas ad testificandum, and for the sake of the record, I'll just read the numbers.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: A-1-ZPAHDB

HEARING OFFICER INGEBRITSEN: ZPAH --

MS. KASETA: -- DB.

HEARING OFFICER INGEBRITSEN: --DB, thank you.

MS. KASETA: A-1-ZPAAZL; A-1-ZP9ZXT; and then that brings us to the four subpoena duces tecum served on Mr. Carrillo and the custodian of records for IAMAW local district lodge 725.

HEARING OFFICER INGEBRITSEN: I'm sorry, could you clarify again; those three subpoenas relate to the custodian --

MS. KASETA: Two are for custodian, two are for Mr. Carrillo.

HEARING OFFICER INGEBRITSEN: Okay. And in essence, they are the same subpoena; is that what you are --

MS. KASETA: Well, these are subpoenas ad testificandum, so they just -- they name different parties but the relevance

of what I -- the reason I would want them to come is the same.

HEARING OFFICER INGEBRITSEN: I understand.

MS. KASETA: I've issued them a subpoena duces tecum, and I may have questions about their relationship with NUHW.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. KASETA: Okay. So the subpoenas duces tecum, there are two for Mr. Carrillo, they are B-1-ZPBFVT --

HEARING OFFICER INGEBRITSEN: I'm sorry, could you restate that? From my dash --

MS. KASETA: B-1-ZPBFVT.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: And B-1-ZPBAKZ.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: The documents that are sought in these two subpoenas duces tecum are relevant to this proceeding because Ryan Carrillo, by the Union's own admission, was involved in organizing employees of the company that owns and operates San Fernando Interventional and San Fernando Advanced.

The Union has already represented on the record that they don't have access to all of Mr. Carrillo's personal electronic devices, so the documents sought in this subpoena are not covered -- the information sought is not covered by the subpoena issued to, and the responses given by, NUHW. And the evidence would be relevant to the question of whether the Union, or any agent or person acting on behalf of the Union, as

Mr. Carrillo would have been doing during the organizing campaign, had any conversations with any employees about these police reports; told them, perhaps, that the Employer was responsible for them; told them alternatively that the Union was responsible for them.

That takes me to the two subpoenas duces tecum issued to the custodian of records. Those subpoena numbers are B-1-ZPBBC7; and B-1-ZPBF05.

The relevance of these documents -- it's similar to the subpoenas issued to Mr. Carrillo, but on a broader scope. While we know that Mr. Carrillo is one individual from that organization, and with an association with NUHW, it's completely unclear whether he's the only individual. Sounds like he was a volunteer who was training with NUHW. The Employers are unaware if there were other individuals who were similarly situated, or had other similar relationships with NUHW.

This subpoena to the custodian of records would establish that, and it also goes to the question of whether any individual who is in the employ, or an agent of IAMAW, had any conversations about the police reports with employees of the Employers.

HEARING OFFICER INGEBRITSEN: Okay, thank you. And that covers Exhibit -- Employer Exhibit 3, correct?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: Okay. And at this time, we do not have a response to these subpoenas, and we do not have a motion to revoke these subpoenas. Is Employer counsel requesting enforcement of these subpoenas by the Board?

MS. KASETA: I will be requesting enforcement of the subpoenas by the Board, but I'll state for the record that I don't think that gives the Board the right to decide that they won't wait for potentially relevant evidence to come into this record, and it gives them the right to -- somehow gives them the right to close the record in this proceeding where the subpoenas are outstanding.

HEARING OFFICER INGEBRITSEN: Okay. So you are not at this time requesting enforcement of this subpoena?

MS. KASETA: I think they're two separate questions. I am requesting enforcement of the subpoena. I do want these documents, and I do want responses from these parties. If it requires the Region to go into the local district court to request enforcement, then yes, I do want that.

What I do not want is for the Region to rely upon my request for enforcement as some kind of grounds for the Region to rule upon the relevance of these subpoenas, thereby closing the record in this hearing.

They are apples and oranges. The right to get enforcement of the subpoena is not concurrent with the right to rule on relevance, and declining enforcement doesn't mean you can close

this hearing without the documents. That's the point I'm making, but I do want the subpoenas enforced.

HEARING OFFICER INGEBRITSEN: Understood. Counsel for the Union, I know you're not a party to this subpoena; do you have any response just for the sake of a complete record?

MS. HOFFMAN: Okay. With regard to any relationship any individuals have to NUHW, the custodian of records, and the person that was in charge of the organizing campaign is here and ready to testify, so that should not be an issue with regard to the enforcement of the subpoenas.

Secondly, according to the Employer, the evidence would establish that employees of bargaining unit at issue were aware of false police reports being filed against individuals who refuse to support or communicate with the Union.

None of these outstanding subpoenas have anything to do with the objection except for secondary evidence of what they objected to. So for those reasons, that's the Union's position, so --

HEARING OFFICER INGEBRITSEN: Um hum.

MS. KASETA: May I briefly respond?

HEARING OFFICER INGEBRITSEN: You may.

MS. KASETA: It's not secondary evidence, it's primary evidence coming from the other side. I'll point out that employees who were concerned about the origin of these police reports, or who might have heard about them from the Union, may

not be willing to testify. That doesn't mean it didn't happen, it means that the evidence -- the best source of the evidence is going to come from the documents that have been requested.

HEARING OFFICER INGEBRITSEN: Okay. Regarding the subpoenas A-1-ZP9NBN, A-1-ZPAHDB, A-1-ZPAAZL, A-1-ZP9ZXT, B-1-ZPBF05, and B-1-ZPBFVT, as well as BPZP -- I'm sorry, B-1-ZPBAKZ, and B-1-ZPBBC7, even though there has been no petition to revoke, I am not going to recommend subpoena enforcement on the part of the Region because I do not believe that counsel for the Employer has established the relevancy of the information. The Regional Director has already ruled on the objection relating to the objection relating to the connection between this union and IAMAW Local District Lodge 725, especially given the fact that the fact that the Employer has not shown any effect on employees at the two locations in issue; I do not recommend subpoena enforcement of these subpoenas.

MS. KASETA: I understand your ruling. I want to point out that the fact that the Regional Director ruled on the question of affiliation and the legal question of whether the affiliation in and of itself -- just the fact of the affiliation -- would be a reason that the election results needed to be overturned at those locations.

We disagree with that ruling, but I understand that ruling. It is a separate matter, and I don't think the two are

causally connected whether an individual associated with IAMAW, or for that matter, any other organization, could have been an agent of NUHW for the purpose of the involvement with the police reports that are at issue today.

So in as much as your ruling regarding the subpoenas rests upon that ruling by the Regional Director, the Employers object to that.

HEARING OFFICER INGEBRITSEN: Noted. I would also just like to clarify that that is not the only reason for my ruling, I also do not believe, as counsel for the Employer has stated, that the best evidence for the effect on the employees is the documents at issue.

As counsel for the Employer has noted, we have people testify all the time who are unwilling to testify, or have been concerned about reprisals or intimidation.

The documents, in my view, requested here, are communications from -- that are in possession of this Union at issue, and this employee -- and individual at issue, and do not actually show any impact or knowledge -- direct knowledge of the employees at the locations in issue. And as such, I do not believe that they are relevant to this hearing.

MS. KASETA: So are you ruling on the relevance of these subpoenas?

HEARING OFFICER INGEBRITSEN: I am saying I do not -- I am not recommending subpoena enforcement because there has not --

the relevancy of this information, in specific regards to the objection at issue, has not been established; particularly because there has been no showing that the conduct of these employees, or any conduct in general, has rendered a fair and free election impossible.

MS. KASETA: And as you know, I consider that circular logic because it's the case that I don't feel I can prove that until I have the documents, but I understand your ruling.

HEARING OFFICER INGEBRITSEN: I understand.

MS. KASETA: And I just want to confirm, you read off a number of subpoena numbers, I want to confirm those are the subpoenas that are in E Exhibit 3 and E Exhibit 4.

HEARING OFFICER INGEBRITSEN: Those were only the subpoenas in E Exhibit 3.

MS. KASETA: Okay. Thank you.

HEARING OFFICER INGEBRITSEN: Yes. I'm going to take a brief recess off the record just so that I can review these documents before ruling on them.

(Off the record at 11:35 a.m.)

HEARING OFFICER INGEBRITSEN: -- back on the record. Counsel for the Employer, I have a question regarding subpoena duces tecum B-ZZPVEKV, or its duplicate --

MS. KASETA: Um-hum.

HEARING OFFICER INGEBRITSEN: -- B-1-ZPV555. And I'm sure I know your position in part to this question, but according

the Employer's offer of proof on objection 2, several of the employees at issue were site managers of the Employer; is that correct?

MS. KASETA: That's correct.

HEARING OFFICER INGEBRITSEN: Okay, and are the -- I know we have redacted information. Does this -- and if you do not want to answer this question because of confidentiality, that fine. Are any of the requested -- does any of the requested information relate to those site managers?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: Okay. But you are not prepared to call those site managers on to testify themselves; is that correct?

MS. KASETA: I could call them to testify, but as I understand the Regional Director's ruling, her interest is in the effect. So I could call a site manager to testify, yes, I voiced my opinion about unionization; yes, the police came to my house on X date, Y date, Z date, and nothing was going on at my house; yes, I tried to get copies of the records from the LAPD and I couldn't on my own; but they are not able to establish -- their testimony would not establish the impact on employees of San Fernando Interventional and San Fernando Advanced.

HEARING OFFICER INGEBRITSEN: Given that, why are these documents relevant?

MS. KASETA: These documents remain relevant for at least two reasons. The first is that, I don't know -- because the LAPD hasn't responded to our inquiries -- what records were created, and who those records have been given to. I don't know who was responsible for the police reports, and I understand the Regional Director doesn't consider that to be a relevant issue, but certainly the Employer does, as I've asserted a couple times during this hearing.

And then, as to the question of, you know, who was impacted, one of the requests -- two of -- so the first two requests are specific as to individuals and addresses. But then, when you move on to requests 3 through 6, I'm asking the LAPD to give me documents that relate to any reports, or telephone calls, or issues that are brought to the attention of the LAPD by either of the two unions we've been discussing, NUHW or IAMAW, or by the named individuals who we had knowledge were working on the Union's campaigns.

That information may illustrate that there were, in fact, other employees at either of those two sites who were directly impacted.

HEARING OFFICER INGEBRITSEN: And what is your basis of belief for that?

MS. KASETA: Because there were so many other people who were impacted.

HEARING OFFICER INGEBRITSEN: All right.

MS. KASETA: And only in this area that was being organized, and only during this organizing campaign; only during those dates.

HEARING OFFICER INGEBRITSEN: And I would just like to clarify that -- you have referred to the Regional Director's position regarding the activity on several occasions. I do believe that the activity is relevant. It's relevant, at least secondarily, to the impact on the employees. So we are not -- the Region is not saying that that is not an issue, but that the big issue for this hearing is the impact on those employees, and whether there was an effect on employees who were voting at the two locations at issue.

MS. KASETA: May I ask you to clarify? Because it may change my presentation of my case. You're saying that it is relevant if I were to -- let's say I make an offer of proof right now that I would call those employees and those site managers and they would be able to testify about the -- their involvement in the organizing campaign and the police reports; that would be relevant testimony to the issue being decided as part of this objections?

HEARING OFFICER INGEBRITSEN: Well, the -- I mean, the conduct has to have occurred, but the most important thing is that the conduct was -- knowledge of the conduct was disseminated to the employees in those two locations, and had an impact on the Employer, or would reasonably have an impact

on employees. So --

MS. KASETA: Understood. And for that, I need the documents, and that's why there's no point in calling those individuals unless we -- you know, step one is getting the documents and establishing that; step two would be calling the individuals. That's how I would exercise my right to present my case in that manner.

HEARING OFFICER INGEBRITSEN: Okay. Are you requesting enforcement of these subpoenas by the Region?

MS. KASETA: Yes, with the same caveats that I made in connection with Employer's Exhibit 3.

HEARING OFFICER INGEBRITSEN: Counsel for the Union, I understand you're not a parties to these subpoenas; do you have a response to that request, or no? Just for the sake of establishing a complete record.

MS. HOFFMAN: The only --

HEARING OFFICER INGEBRITSEN: You don't have to.

MS. HOFFMAN: I don't have any response on that request.

HEARING OFFICER INGEBRITSEN: Okay. Because I -- like the counsel for the Employer stated, at issue here is the effect on the employees at issue. I do not see how these documents requested in this subpoena duces tecum could show effect on the employees in question, and as such, I would not recommend enforcement because not been -- established as relevant.

Do we have other outstanding subpoena issues?

MS. KASETA: I believe we do in connection with the NUHW's subpoena responses.

HEARING OFFICER INGEBRITSEN: Okay. Okay, let's turn to those.

So we still have an issue, from my understanding, with number 3?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: And number 1?

MS. KASETA: Well, I'm a little unclear, I think, on where we stand on 1 because I think at one point, there was some level of agreement about in-camera review that I don't want to at all speak for the Union on that.

HEARING OFFICER INGEBRITSEN: Okay, so let's discuss our position regarding number 1 in subpoena B-1-ZPB8FR, that requests any and all documents, including but not limited to, any emails or text messages in which any employee informs the Union that he or she, or some other employee, is opposed to representation by the Union, or prefers not to communicate with the Union about representation by the Union.

RadNet requests any responsive documents initially to be produced only to the Hearing Officer for in-camera review.

So Counsel for the Union, what's your position as to number 1?

MS. HOFFMAN: The Union has documents, but none of them are from the locations with regard to these objections. And

again, we're not clear what the effect was on these locations, and what relevance these documents have to the Employer's entire case. But we -- I mean, we have the documents here for an in-camera review if the Region is so inclined to review them.

HEARING OFFICER INGEBRITSEN: Okay. So you would be open to an in-camera review, but you object to the relevance of the request.

MS. HOFFMAN: That's correct.

HEARING OFFICER INGEBRITSEN: Okay. Counsel for the Employer, do you have a response?

MS. KASETA: Yeah, I think that the -- I mean, it's our position that the documents that we've requested are relevant, regardless of the Union's representation that none are from the two locations. For at least two reasons: One, as you previously just indicated, if the Regional Director does retain some interest in the question of causation -- who was responsible, and is the Union responsible for the filing of the police reports -- these documents may contain information that's relevant to that question. Additionally, you know, in as much as employees might say, I heard about the police reports and now I don't support the Union, or -- and I'm obviously just hypothesizing --

MS. HOFFMAN: We don't have any of those type of documents because we --

MS. KASETA: That's what I would be asking for the in-camera review to include because if you don't, then you don't, but that's why it would be relevant. And also for the purpose of, you know, being able to match up the individuals who were the subject of the police reports, with, you know, a causal connection that they did reach out to the Union and make known their desire not to be represented.

You know, the fact that the employees aren't from the locations doesn't mean that there's not relevance to the objection.

HEARING OFFICER INGEBRITSEN: Okay. Because there's no objection from the Union for an in-camera inspection and the in-camera inspection has been requested by the Employer, I will conduct an in-camera inspection of the documents provided by the Union and a list of targeted employees provided by the Employer. And I'm going to go off the record to do so.

MS. KASETA: What I will give you is a copy of the --

(Off the record at 11:49 a.m.)

HEARING OFFICER INGEBRITSEN: Pursuant to a request by the Employer and with the permission of the Union, I have reviewed the documents provided by the Union, as well as a list of employees provided by the Employer. These documents are not part of the record, and any evidence -- any of the content of these documents will not be part of the record or be considered in the response.

Would the parties like to come up and collect the documents?

How would Employer counsel like to proceed on the issue of number 1?

MS. KASETA: Well, I just need to know the results of your in-camera review; whether the cross-reference list of names and any of the documents produced by the Union have a match. Are any of the employees who were named in -- who were the subject of the police reports -- individuals who had communicated to the Union directly that they didn't want to be represented?

HEARING OFFICER INGEBRITSEN: Okay. And counsel for the Union, what's your position on that?

MS. HOFFMAN: Again, without knowing whether or not the employees at the location were affected by whatever happened and any causal connection, I don't know. I feel like we're talking about secondary evidence or -- so at this point, we don't think it's relevant.

HEARING OFFICER INGEBRITSEN: Okay. Understanding that as an objection to relevance, I'm going to overrule the objection as to relevance. While this does not show dissemination of knowledge to any parties at the locations at issue, I do believe that it is relevant to the Employer's claim and in objection to. So I am going to say the results of my in-camera inspection on the record.

And the reason it's relevant is because it relates to

Union knowledge of these individuals now supporting the Union, which would go to the Employer's contention that the Union targeted these individuals. Because of that and more -- most importantly that it was disseminated to other individuals.

There were two names that appeared in both documents -- and I apologize, I did not write the last names down, but I have the first names: Twyla, T-W-Y-L-A; and Stephanie (phonetic) appeared on both of the lists. If you would like more information, I can review the documents again, but if that's sufficient for your information --

MS. KASETA: I would request a -- on that basis, I would request that those documents that are specifically relevant, which would be the ones that applied to the two employees who received the false police reports, and who are named on this list, I'd like those documents, please.

MS. HOFFMAN: I object to the Employer calling them false police reports, since I don't know whether they were false or not, since I don't know any circumstances regarding these police reports, so -- they keep saying that they're false, but as far as --

HEARING OFFICER INGEBRITSEN: Um-hum.

MS. HOFFMAN: -- the Union knows, there could have been a domestic disturbance, or whatever it is that they allege in there.

HEARING OFFICER INGEBRITSEN: I understand.

MS. KASETA: Well, on the basis of this new information, if I have access to those documents, I will be subpoenaing and calling Stephanie and Twyla.

MS. HOFFMAN: Okay.

HEARING OFFICER INGEBRITSEN: Okay. I'm going to -- I don't know, counsel for the Employer, if -- or I'm sorry, for the Union -- if you are objecting to the request for the documents, or just objecting to the statement regarding the police reports.

MS. HOFFMAN: I was -- I'm objecting the statement regarding the police reports --

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: -- being false police reports because there has been no evidence of anything yet, so --

HEARING OFFICER INGEBRITSEN: Okay. So I am going to -- so will you provide that document to --

MS. HOFFMAN: What document are we asking for now?

HEARING OFFICER INGEBRITSEN: The document regarding both -- that references Twyla and Stephanie.

MS. HOFFMAN: That's it, here?

HEARING OFFICER INGEBRITSEN: Yeah. Okay.

MS. KASETA: Is that something you're willing to produce?

MS. HOFFMAN: Yes.

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: This is the whole thing here.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Okay. I will follow up with this on -- when questioning the Witness.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: And if that's the only document that's relevant, and that's a complete response from the Union, which it sounds like it was, then I feel that request 1 has been complied with.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: I'm not seeking production of anything else.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Except maybe, the rest of this text exchange.

HEARING OFFICER INGEBRITSEN: Okay. So with request 3, from my recollection, counsel for the Union has indicated that they have provided all names and work addresses within their knowledge of individuals who engaged in activity in support of the Union's efforts to organize the employees; is that correct?

MS. HOFFMAN: We provided all the staff, and we also gave some indication about Ryan Carrillo, is that the name?

UNIDENTIFIED SPEAKER: Carrillo.

MS. HOFFMAN: Carrillo.

HEARING OFFICER INGEBRITSEN: Okay. So counsel for the Employer, is this a sufficient response for you for request number 3?

MS. KASETA: No, I'm seeking in request number 3 not just

those individuals employed NUHW, but also any individual who engaged in any activity in support of the Union, so my request is much broader than just staff.

And I understand that there is some compliance because I have Ryan Carrillo's name, but I don't know if there are any other people who are similarly situated to him, who weren't paid but were still actively engaged in the Union's campaign, so it's an incomplete response.

HEARING OFFICER INGEBRITSEN: So, Ms. Hoffman, are you provided -- or are you able to present an offer of proof regarding any other employees who might be --

MS. HOFFMAN: The other employees involved were all employees of the Employer, who volunteered time to help organizing. And we're not going to provide those names because they are protected under the National Labor Relations Act.

HEARING OFFICER INGEBRITSEN: So it's -- so you are stating that there are no other individuals like Ryan Carrillo, who are not employees of the Employer, involved in this organizing campaign?

MS. HOFFMAN: That's correct.

HEARING OFFICER INGEBRITSEN: Does that -- counsel for the Employer, does that satisfy you?

MS. KASETA: I'll follow up when I examine the witness --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- I think. I think that probably makes the

most sense --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- and then, I'll let you know if I'm satisfied.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: I mean, I do think that my request does encompass employees. I understand the objection that the Union is raising. I do think that information is relevant and that the Hearing Officer will have to make a ruling balancing Section 7 rights against the relevance to this proceeding, but I don't think we need to do it right now. I might be able to satisfy myself after speaking -- doing an examination of the witness.

HEARING OFFICER INGEBRITSEN: Okay. Okay. So given that, I believe we can move forward with the presentation of evidence?

MS. KASETA: Yes. I would like to, at this point in time, make a request on the record -- I think I requested previously, 15 subpoenas and -- 15 subpoenas and 15 subpoenas duces tecum; so I may not actually need additional subpoenas. I have to check. I don't -- I did a total of 20, which means there should be still some that I have --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- but I will want an opportunity to issue a new subpoena to LAPD, and potentially, additional subpoenas to

individuals named by the Unions production, in response to question number 3 -- or request number 3, which we just discussed. Aside from that, at the moment, I'm ready to present the courier. I'd still like to do that. I'd still like the evidence about proper service on the record, it seems like it may still be relevant. And then I'm probably going to -- I can I guess question Ms. Mendoza, and then we can see where we're at. But I may have additional witnesses to call, and I don't have them here with me now, but I would be able to -- whether it be today or tomorrow have them here.

HEARING OFFICER INGEBRITSEN: I understand. Okay, let's begin with your first witness.

MS. KASETA: Okay, I'm going to call Nelson to the stand.

HEARING OFFICER INGEBRITSEN: Hello. Would you please state your name and spell it for the record?

MR. BELTRAN: My name is Nelson Beltran. That's N-E-L-S-O-N B-E-L-T-R-A-N.

HEARING OFFICER INGEBRITSEN: Okay. Mr. Beltran, can you please raise your right hand?

Whereupon,

NELSON BELTRAN

having been duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

Q BY MS. KASETA: Okay, Nelson, I'm just going to ask you a

couple of questions now. Who is your employer?
A RadNet.
Q Okay, and what is your job title?
A I'm a courier.
Q And what are your typical job duties?
A Deliver inter-office envelopes and office mail.
Q Okay, and did you work on Friday -- did you work on Friday, January 26th, 2018?
A Yes.
Q And what did you do on Friday, during your work hours?
A During my work hours, I did my normal inter-office pickups and I also deliver the subpoenas at the second part of my shift.
Q Okay, and where did you pick up those subpoenas from?
A Corporate office.
Q Okay, and where is that located, if you know.
A 1510 Cotner.
Q Okay, is that in Los Angeles?
A Yes.
Q Okay, and do you remember the cities that you delivered subpoenas to?
A Yes. Glendale, downtown Los Angeles, and Huntington Beach.
Q Okay, and is that the order you delivered the subpoenas in?

A That's the order, yes.
Q Okay. On your witness stand there, in front of you, you'll see a document. Is that a document that's marked as Employer's Exhibit 1? Actually even entered into evidence at this point?
A Yes.
Q Okay. Are these the documents that you delivered to Glendale?
A Yes.
Q Okay, and directing your attention to the first page, and the top line, that says to. There's an address there. Is this the address to which you delivered the documents?
A Yes.
Q And who, at that location, received the documents?
A Receptionist.
Q Okay, and did she take the documents?
A Yes, she did.
Q About what time did you deliver the documents in Glendale?
A Around 2:00 p.m., I believe.
Q Okay, and where did you go to next?
A I went to downtown.
Q Okay, and again in front of you there's some documents that are marked as Employer Exhibit 4. Do you see those?
A Yes.
Q Okay. Are these the documents that you delivered to

downtown Los Angeles?

A Yes.

Q Okay and directing your attention to the line that says to on the first page. Is this the address to which you delivered the documents?

A Yes.

Q Okay, and did someone take the documents from you at that address?

A Yes.

Q Okay, and who was that?

A Receptionist.

Q Okay, and about what time did you deliver the documents to the receptionist?

A Say around -- around 3:00.

Q Okay.

A 3:00 p.m.

Q Okay, and where was your last stop?

A Huntington Beach.

Q Okay. I'm going to direct your attention to Employer Exhibit 3, which you do also have in front of you. Are these the documents you delivered to Huntington Beach?

A Yes.

Q Okay, and directing your attention to the to line on the first page of these documents, is that the address you delivered these documents to?

A Yes.
Q And who did you hand these documents to at that location?
A Receptionist at the window.
Q Okay, and did she accept the documents from you?
A Yes.
Q Okay, and about what time did you deliver those documents?
A I'll say 4:00 p.m.
Q Okay. All right. And now the final thing I want to ask you about is Employer Exhibit 2. Do you see those documents?
A Yes.
Q Okay, does your signature appear on these documents?
A Yes.
Q And what line is it on?
A I'll say the second line under the date.
Q Okay, and when did you sign these documents?
A This morning.
Q Okay. Do you understand that these documents state that you delivered subpoenas?
A Yes.
Q Okay, and you signed them?
A Yes.
Q Okay. I have no further questions for this witness.
MS. HOFFMAN: Nothing.
HEARING OFFICER INGEBRITSEN: Okay, thank you for your testimony.

MS. KASETA: Can we go off the record for a minute, so I can just see Nelson off?

HEARING OFFICER INGEBRITSEN: Sure we may. Off the record.

MS. KASETA: Thank you.

(Off the record at 12:08 p.m.)

HEARING OFFICER INGEBRITSEN: Thank you, we're back on the record. Employer do you have any more witnesses that you'd like to call today?

MS. KASETA: I'd like to call Sophia Mendoza, please.

HEARING OFFICER INGEBRITSEN: Okay. Ms. Mendoza, can you please state your name and spell it for the record?

MS. MENDOZA: Yeah, it's Sophia Mendoza. S-O-P-H-I-A M-E-N-D-O-Z-A.

HEARING OFFICER INGEBRITSEN: Thank you. Can you please raise your right hand?

Whereupon,

SOPHIA MENDOZA

having been duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

Q BY MS. KASETA: Okay. Ms. Mendoza, I would just ask you to direct your attention to Employer's Exhibit 1. I'll give you a minute to review the document, so if you can let me know when you have done so.

A Got it.
Q Okay. Do you recognize these documents?
A Yes, I do.
Q Okay, how do you recognize these documents?
A They were delivered to the office on Friday. Glendale office of NUHW.
Q Okay, and they were sent within the office to your attention?
A Correct.
Q Okay, so you personally reviewed them on Friday?
A I actually did not open them until today.
Q Okay, could you explain to me how it is you could have complied with the subpoena request, if you didn't open them?
A Because I got them by email on Thursday, I believe.
Q Okay.
A I'm not 100 percent sure on that date.
Q Your lawyer provided you the email courtesy copy?
A Correct.
Q Okay, so you reviewed the email version, or the electronic version of these documents on Thursday?
A Correct.
Q Okay and directing your attention to any of the subpoena duces tecums, so I'll take the one that I think is on the top, B-1ZPB8FR.
A Okay, got it.

Q Do you see that document?
A Yes, I do.
Q Okay. You understand that today you are appearing both on behalf of yourself as a subpoenaed individual, but also as the custodian of records for NUHW?
A I do.
Q Okay. Directing your attention to page three of the subpoena, can you please describe for me the efforts that you undertook to obtain documents responsive to request number one?
A I'm sorry, it's B1ZPB8FR? Is that it?
Q Yes.
A Okay. So in order to satisfy this request, I reviewed all of my emails and my text messages. I asked both Christian and Keegan to review their texts and emails. And I actually also spoke to Ryan Carrillo about whether or not he has anything for under number one.
Q Okay, and did they respond to you?
A They did.
Q Okay, and did they in response to your request produce any responsive documents?
A They said that they didn't have any.
Q So neither Christian, Keegan, or Ryan received any emails or text messages from any employees who were opposed to representation?
A Correct.

Q And did you ask them to check their personal -- any personal accounts or devices, as well as professional business accounts or devices?

A In terms of the NUHW employees, we only have one cell phone. It's both our personal and work phone. I am not 100 percent sure about Ryan.

Q Okay. What about email addresses?

A I'm sorry, can you ask the question again about email addresses?

Q Oh, sure. So did you instruct Christian, and Keegan, and Ryan, to check their work email, or both their work email and personal email?

A I instructed them to check their work email. We do not normally, we do not use our personal email for work related matters.

Q Okay, so you did not instruct them to check their personal email?

A That is correct.

Q Okay, and response to request number two, can you describe the efforts that you undertook to comply with this subpoena request?

A It's the same as number one. Do you want me to describe it again?

Q The subpoena request number two states for the period October 1st, 2017 to present, any and all documents including,

but not limited to phone records that show, refer evidence, or relate to any communication by the Union, or any employee to the Los Angeles Police Department, and/or -- I'm sorry, I understand. You're not saying the requests are the same. You're saying your response is identical.

A Correct.

Q Okay. Did you make any effort to pull the phone records for the NUHW phones in the building?

A They're not actually NUHW phones. They are personal phones that we also use for our work. That's why -- and I don't have access to personal phone -- those records.

Q Okay, so you just asked these other individuals --

A Correct. If they had phone records.

Q -- if they -- if they ever --

A Correct.

Q I'm sorry, I just didn't let you finish.

A I just asked.

Q Okay.

A Verbally. I didn't actually pull any records.

Q And so what was the question you asked?

A I asked them if they ever communicated, called LAPD at all, in part of this organizing campaign.

Q And they all responded no?

A That is correct.

Q I want to ask you about the document that was produced in

request -- in response to request number three. And I apologize, I don't have copies, but I'm going to show you that document, Employer Exhibit 4, I'll make copies at our next break.

MS. HOFFMAN: We have copies.

MS. KASETA: Or, I'm sorry, Employer Exhibit 5.

MS. HOFFMAN: I don't have them at the moment.

MS. KASETA: Okay, well, I can make copies.

THE WITNESS: Yeah, I'd like to see it. If I can look through my bag really quickly.

MS. KASETA: Sure. That might be easier.

THE WITNESS: Oh, I have them. I only have three.

HEARING OFFICER INGEBRITSEN: I think that should be sufficient. We already have one. Thank you, very much.

Q BY MS. KASETA: Thank you. Okay, I'm marking this as Employer Exhibit 5.

(Employer Exhibit Number 5 Marked for Identification)

Q BY MS. KASETA: Do you recognize this document?

A Yes, I do.

Q Did you create this document?

A Yes, I did.

Q Okay, and did you do so in response to the Employer's subpoena?

A Yes, I did.

Q Okay, and I understand from prior representation to me by

your counsel, on the record, that this a complete list of everybody who was employed by NUHW who worked on the campaign, correct?

A That is correct.

Q And then with regard to volunteers, there's one volunteer, Ryan Carrillo listed here, correct?

A Correct.

Q Were there any other volunteers who worked on this NUHW campaign, involving RadNet?

A There might be one or two other who came to maybe one or two meetings. But did not work on the organizing campaign, specifically.

Q Okay, so they would have worked on what part of --

A They just attended a meeting or two.

Q Like informed members of the public, or something?

A No, we had meetings with workers, and they attended one or two of those meetings. They did not -- they were not assigned to the campaign.

Q These individuals that you're speaking of now, are they employees of RadNet?

A No, they are -- wait, do you mean on this --

Q So the other volunteers who are not named here.

A Oh, they are not.

Q Okay, and they're not employees of NUHW?

A One of them is an employee of NUHW. The other one is an

employee of the IAM.

Q And what are the names of those two individuals?

A Pete Clayton for NUHW and Joe Salice (phonetic)for the IAM.

Q With regard to the subpoena, did you check with either of them about any of their records?

A I did not because they only attended one or two meetings in the very beginning of the campaign.

Q And aside from those two individuals, the only other volunteers were employees, correct?

A Employees of RadNet, that's correct.

Q Without giving me any specific identifying information, approximately how many employees volunteered?

A In the whole campaign? The duration of the campaign?

MS. HOFFMAN: I'm going to object. I think this goes to protected concerted activity and it goes to the -- to protected status of employees who are engaged in activities. And I think that should be confidential. Even the numbers of the employees involved.

HEARING OFFICER INGEBRITSEN: What's your response?

MS. KASETA: I don't think that's accurate. The number of people in a campaign, that was pretty broad and encompassed hundreds of employees. I think that there's no concern that the identify of those individuals would be revealed. I don't want to know where they worked, or when they were involved, or

anything identifying about them at all. I'm really just asking in order to ascertain what I want to do about the subpoena request, which did -- it did -- it was broadly written to include those voluntary employee organizers. So I'm just trying to determine whether, you know, I want to continue to pursue enforcement of that, or whether that's not necessary.

HEARING OFFICER INGEBRITSEN: I guess I'm having a little trouble understanding how the number of employees who are volunteering would help you to determine whether to move forward with this request or not. Can you expand upon that?

MS. KASETA: Because, well, for one thing, I think the question of whether there's a concern about protected concerted activity is greater if Sophia's answer was, you know, well, there were only like a couple people. Then I might not pursue the information because it might be the case that it would be too infringing upon their Section 7 activities, or it would be too much cause for concern. Whereas if it's 100, I also might not pursue it because it's 100 people. And, you know, there's got to be a limit on how far down a path you would go.

HEARING OFFICER INGEBRITSEN: Uh-huh. And how would these individuals who volunteered go towards the dissemination of knowledge of the conduct at issue?

MS. KASETA: Depending on the relationship with NUHW, the fact that they're not paid doesn't necessarily affect their agency status. So they might still be agents of the Union.

And so if they were acting on behalf of the Union and doing things like filing police reports, or talking with other employees about police reports, then it's relevant to the objection.

HEARING OFFICER INGEBRITSEN: Because I think that the protection of Section 7 activities tantamount and I think that on balance the relevancy of this information is not greater than either the protection of these individuals, I'm going to sustain the objection as to the question regarding the number of volunteers.

MS. KASETA: Okay.

Q BY MS. KASETA: Okay, and Sophia, to sort of move things along here, with regards to four -- request four, five, six, and seven, would your response to how did you go about finding out if there were any responsive documents, would it be the same process that you followed with regard to request one and two?

A That is correct.

Q Okay, so you would have spoken with Christian, Keegan, and Ryan and said do you have any documents responsive, and they would have said yes or no.

A Correct.

Q And presumably they said no, because the Union has said there's no responsive documents, right?

A Correct.

Q Okay. I'd like to ask you about the involvement of the IAM on the Union's campaign. Why was Ryan Carrillo working on the NUHW campaign involving RadNet?

A We were training him to do healthcare organizing.

Q Is that something that the IAMAW is looking to undertake?

A Yes.

Q Okay. Do the two unions participate in other training functions together?

MS. HOFFMAN: I'm going to object as to relevance.

MS. KASETA: I think it goes to again, the question of an agency relationship between the Unions, which actually might be useful with regard to the relevance of the other subpoenas.

HEARING OFFICER INGEBRITSEN: I'm going to allow it and give it the proper evidentiary weight it deserves.

THE WITNESS: Can you repeat the question?

Q BY MS. KASETA: Probably. I think I asked if the NUHW and the IAM participate in other training functions together.

A Can you clarify what you mean by training functions?

Q Sure. Are there any joint sessions of any kind of training of any kind, held between NUHW and IAM?

A Do you mean like regularly?

Q No, I mean ever.

A Ever.

Q Uh-huh.

A Just so I understand your question. You're asking me if

there's been any other training that had been joint NUHW and the IAM?

Q Right.

MS. HOFFMAN: I'm objecting further because whatever -- I mean that's a long -- that's a long-time period to have anything to do with this particular campaign.

MS. KASETA: I'll limit the question to in the past 18 months.

HEARING OFFICER INGEBRITSEN: Okay.

THE WITNESS: There's been one training. I believe it's been within the last 18 months that NUHW actually did with IAM.

Q BY MS. KASETA: And what was that training on?

A The healthcare industry and our organizing methodology.

Q Okay, and what's the reason for the NUHW's involvement in training IAM on how to organize the industry that you already organized? I would think that would be --

MS. HOFFMAN: Object. Relevance.

HEARING OFFICER INGEBRITSEN: Can I ask the relevance of this line of questioning?

MS. KASETA: Yeah, I think I've stated because it's hard for me to believe that NUHW would undertake to train IAM to organize the same exact set of employees that NUHW already organizes, unless there was some kind of joint relationship between IAM and NUHW. And that goes to the question of whether or not IAM particularly in connection with this campaign, was

actually as an agent of NUHW.

HEARING OFFICER INGEBRITSEN: Do you have a response?

MS. HOFFMAN: Without anything specific, that does not go to the relationship of whether they were acting as an agent in this campaign. We already said that there were two individuals that worked on this campaign. And the objections with regard to the association between the IAM and the NUHW were overruled for purposes of this hearing. The labor movement is working together on many issues, so I mean I think it's over -- it's not relevant to these particular objections.

HEARING OFFICER INGEBRITSEN: I'm going to allow a limited further questioning on this line, but I do counsel to keep the issue in this matter is objection number two, and the important deciding factor is the dissemination of the information to employees. And so I would counsel them to attempt to keep their questions more related to that topic.

Q BY MS. KASETA: Okay, and my question, I believe was what is the purpose of NUHW training IAM to organize in an industry in which NUHW itself already organizes.

A It's a joint project. We believe that the more organized healthcare workers there are, that the more power workers have in our industry.

Q And is there going to be -- for example, if IAM organizers organize a location, I assume that IAM would be the Union representing those workers.

MS. HOFFMAN: Objection. How events to this particular petition. This wasn't a joint petition.

MS. KASETA: Well, we disagree. And I know that --

MS. HOFFMAN: Well, it wasn't a joint petition.

MS. KASETA: Well, maybe it should have been. The Region -- I understand the region has overruled that objection with regard to the affiliation. But I think the evidence is still relevant with, to whether the question of these individuals from IAM, who by the Union's admission, worked on this specific organizing campaign were agents or not.

If they're organizing separately then that's a different question. But if they organize subject to the rules set forth by NUHW and there's a financial -- some kind of relationship between the two of them that benefits NUHW, then they're almost certainly agents.

MS. HOFFMAN: Again, the future plans of whether they're going to organize together has no relevance to this particular case.

MS. KASETA: I've already stated my position.

HEARING OFFICER INGEBRITSEN: I am going to sustain the objection. Please limit the questioning to this campaign and like I stated, the objection and evidentiary burden at issue. And so I do not believe that the -- like counsel for the Union stated, future plans between these two unions has any relevance as to the issue at hand.

MS. KASETA: I understand your ruling. I will not for the record I don't think we're talking about future plans, and I don't think that I'm worried as much about future plans, about what's already been put into place. But I will defer to your ruling, for the moment, and I don't have any further questions for this witness on the basis of that ruling.

HEARING OFFICER INGEBRITSEN: Okay. Any cross examination?

MS. HOFFMAN: I have no -- I have no questions for this witness.

HEARING OFFICER INGEBRITSEN: Okay. Thank you, Ms. Mendoza. Okay, so counsel for the Employer, these are all the witnesses that you are prepared to put on today; is that correct?

MS. KASETA: Yes, and I just need to go off the record. I need to go off the record and speak with my client about, you know, the developments with regard to the subpoenas and the documents. I believe that those issues are still unresolved, and I've noted the need to subpoena additional individuals in connection with this case. And so it would be my position, and the Employer's position that the hearing needs to continue to receive the documents responsive to those subpoenas. I understand that the Union's not -- I'm sorry, that the region is declining to enforce. But I think there's no petition to revoke, so they're still outstanding at the board level.

So I would ask that we, you know, continue this hearing at this point. But if not, I will need to speak with my client, about whether I'm going to call any other witnesses. And one final thing. Relevant to that inquiry, I want to make sure I understand the Regional Director's position with regard.

HEARING OFFICER INGEBRITSEN: The Regional Director has no authority over this hearing. I'm the hearing officer in charge, so there's no -- the Regional Director's opinion was stated in the report regarding the objections. But there is no -- they do not -- the Regional Director does not have an opinion on this.

MS. KASETA: Okay. I was going to ask about the ruling in the hearing on objections. But I can also bring that as a question to you as the hearing officer.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Which is the question of the relevance of testimony from employees who did advise the Union they didn't want to be represented, and then have the police come to their homes. And I understand the Union's saying that they don't prefer the use of the term false police reports, so I'm avoiding using it intentionally.

But what, if any, relevance, do you, as the hearing officer, believe that evidence would have to this hearing, and the question in this hearing? Because that's going to be the deciding factor for whether or not I call these witnesses.

HEARING OFFICER INGEBRITSEN: So I can't make a statement as to the relevancy of testimony that I have not heard yet. I will say that the established case law says that a -- you know, an election will only be set aside if misconduct, well, by a third party -- third party misconduct was so aggravated, as to create a general atmosphere of fear and reprisal. So what I am looking for, in this hearing, is evidence that whatever conduct occurred, which we have not had any evidence, we haven't had any evidence of any conduct, but the most important evidence is the dissemination -- and maybe dissemination is -- I'm using that term in a confusing way, that employees at the two locations at issue knew of this conduct before the voting period. That is the critical evidence that we are looking for.

MS. KASETA: Understand --

HEARING OFFICER INGEBRITSEN: Under your objection.

MS. KASETA: Understanding that position that you set forth, and I understand it's not a ruling, but understanding that position from you, and reading that in the context of the Regional Director's decision on objection, I don't believe I'm going to call other witnesses. But I'd like an opportunity to confer with my client.

HEARING OFFICER INGEBRITSEN: Okay. This is -- well, how much time would you like to confer with your client? I'm just wondering whether we take a break for lunch now, or whether we take a couple of minutes to --

MS. KASETA: Let's take ten minutes.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: And I'll step out of the office and make some phone calls. And then come back.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Because I don't want to hold everybody for like a 40-minute lunch if I'm just going to come back and say that at this point we're just awaiting the documents.

HEARING OFFICER INGEBRITSEN: Okay. Okay, so we will go off the record and resume at 12:45.

MS. KASETA: Okay. Thank you.

HEARING OFFICER INGEBRITSEN: Uh-huh.

(Off the record at 12:36 p.m.)

HEARING OFFICER INGEBRITSEN: On the record.

MS. KASETA: Okay, first order of business, I'd like to move Employer's Exhibit 5 into evidence.

HEARING OFFICER INGEBRITSEN: Counsel for the Union, any objection to Employer's Exhibit 5?

MS. HOFFMAN: Which exhibit was that? Yeah, no objection.

HEARING OFFICER INGEBRITSEN: Hearing no objection, I enter Employer's Exhibit 5 into the record.

(Employer Exhibit Number 5 Received into Evidence)

MS. KASETA: Okay, next I want to request on behalf of the Employers, an additional ten subpoenas ad testificandum. An additional ten subpoenas duces tecum, for the purpose of

issuing, as I've stated previously on the record, subpoenas to additional organizers affiliated with the NUHW for their personal email addresses, and for those who weren't covered by the original subpoena, because they are not employees of the NUHW. As well as an additional subpoena to LAPD which covers these individuals about who the Employer just learned today.

HEARING OFFICER INGEBRITSEN: Okay, I'm not sure whether I am the person to request those --

MS. KASETA: You are. Once the hearing has opened it is the hearing officer. I was going to use the ones I already have. But since the hearing's open.

HEARING OFFICER INGEBRITSEN: Okay, so you can't use those subpoenas. Is that correct?

MS. KASETA: I don't -- I'm not sure. I mean they're the Board's rules --

MS. HOFFMAN: You can.

MS. KASETA: But first of all the date on them would be incorrect, because they're asking for documents and people to appear today, so they're going to have to be dated on whatever day to which we continue.

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: May I respond. The actual subpoena says January 29th, or re-scheduled date, so usually they're good for the whole hearing.

MS. KASETA: Well, it's up to -- it's up to the Region.

If the Region says that I can use the ones I already have, then I'll use the ones I already have. But I just didn't want to have an issue with the Region, where they said, well, these subpoenas aren't enforceable because you didn't request the from the hearing officer, since the case had opened on the record. I've always requested from the Hearing Officer.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: At that point.

HEARING OFFICER INGEBRITSEN: Let me just -- let's go off the record, quickly, so that I can figure out the proper way to proceed.

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: To see whether we need to issue more subpoenas. So we'll take a quick five-minute break. I'll be right back.

(Off the record at 12:49 p.m.)

HEARING OFFICER INGEBRITSEN: We're now back on the record. We've established that the counsel for the Employer can use the subpoenas that have already been issued to them, and change the dates, since they are the ones who entered the dates on the subpoena. There are still ten subpoenas that they need five duces tecum and five ad testificandum. That the Region will begin to prepare and get to them in about an hour. And you'll send these via email to the parties. Is that correct?

MS. KASETA: To the what email?

HEARING OFFICER INGEBRITSEN: We'll send it to your email?

MS. KASETA: Yes, that's fine. So long as the Region doesn't object to us using the outstanding five subpoenas ad and five subpoenas duces that we have currently, we'll use those, plus the five new ones.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Beyond that, I know that it was -- where we last left off, I was going to confirm whether or not we were calling any other witnesses today. I have spoken with my client, and again, you know, tracking back to what I said before we took our original break, you know, given the position of the Region, with regard to the relevance of the testimony as set forth in the Regional Director's decision on objections, we're not calling any other witnesses at this time. But it's our position that the record needs to remain open in connection with the outstanding subpoenas, as well as the new subpoenas.

HEARING OFFICER INGEBRITSEN: Position of counsel for the Union?

MS. HOFFMAN: The position for counsel for the Union is that the employees are more important than any of the subpoenaed requests being made because the whole issue has to do with the effect on the bargaining units at issue. And that without those witnesses it seems like this whole subpoena effort is just a delay tactic. And the Union requests that the

objections be dismissed for lack of evidence.

MS. KASETA: And just to briefly respond, we do not think that the objection should be overruled at this juncture. We think it would be prejudicial to the Employer's case and the ability to put on its case to not present the opportunity to have the documents that were subpoenaed, and that will be subpoenaed. That that would be a prejudicial ruling.

HEARING OFFICER INGEBRITSEN: Okay. I'm going to delay my ruling on the motion to dismiss the objection. I do believe that it's relevant to hear the testimony of any witnesses that the Employer may have, based on the new evidence that arose today. So we will continue this hearing tomorrow as scheduled. And at that time, I expect the Employer to present evidence regarding employee knowledge of misconduct at the two location at issue.

MS. HOFFMAN: I have a hearing at Region 21 tomorrow that was scheduled. It was rescheduled from last Thursday. It was taken off calendar when the government was shut. So I'm not available tomorrow.

MS. KASETA: And I actually was going to raise a request, and I know that typically the hearings continue day to day until all of the evidence has been presented. But in this case, I think both parties understand that there might be forthcoming petitions to revoke. Those are due within five business days of the service of the subpoena. So in those

circumstances, I'd make a request that we continue after the period that covers the petitions to revoke. The reason being that if there's a petition to revoke that's file, then the Region's going to rule on the petition to revoke. You know, we're going to have an opportunity to respond. And if the petitions to revoke are granted, I won't have further evidence to present. Alternatively, if they're not granted, we come, and we have the hearing, or alternatively, if there's no petitions filed and no documents, then the Region has already decided it won't enforce, so it just sort of makes more sense to let that period play out. So I'd propose. Let me just look at the calendar really quickly.

My request to the Region for really purposes of efficiency would be --

HEARING OFFICER INGEBRITSEN: I believe that the Regional Director needs to make a determination if --

MS. HOFFMAN: I can do it Wednesday. I just can't do it tomorrow.

HEARING OFFICER INGEBRITSEN: There is a postponement beyond the normal consecutive days. Let me just --

MS. KASETA: Right. What I'd be suggesting is that we reconvene on the fifth, depending on the rulings of the petitions to revoke, that will or won't be filed. And whether or not -- I mean if LAPD doesn’t show up -- it sounds like IAM is going to petition to revoke. And the Region will rule

however they're going to rule on that. Then if LAPD if they don't show up on the fifth, well, you've already taken the position -- the Region's already taken the position that you're not going to move for enforcement, so I would say at that point, you know --

HEARING OFFICER INGEBRITSEN: Understood. I'm just trying to figure out who makes that determination.

MS. HOFFMAN: I'm not available on the fifth.

HEARING OFFICER INGEBRITSEN: So --

MS. HOFFMAN: I'm available Wednesday to the end of the week.

HEARING OFFICER INGEBRITSEN: While I understand the parties position on the delay. Parties have been advised prior to the hearing of the matter's urgency, and that it would continue on consecutive days until completion, requests to delay are rarely granted, and only under the most compelling circumstances. I do not believe that these are the most compelling circumstances. So --

MS. HOFFMAN: I don't understand why we can't have the employee here today.

MS. KASETA: I'm not -- I'm not calling -- maybe I should clarify for -- because maybe this makes it easier for you to Madam Hearing Officer. I'm not calling any other employees. I'm not calling any other witnesses until I get documents. So we could all come here tomorrow, but if I don't have -- if LAPD

doesn't show up, or IAM doesn't show up, and I don't have documents produced to me, then I'm not calling a witness. So we would just be all coming in and saying, okay, they didn't come today. All right. Well, now we're going to leave. So we've either got to close the record or you've got to continue it to a date after the -- you know, logically it makes sense. There's a period during which they could petition to revoke. And then after that I understand your power to decide whether to enforce or not enforce the subpoenas. And so like then I would be saying okay, fine, we can close the record. There's nothing left to do. You're not going to enforce the subpoenas. While I disagree with that, you know, that's a ruling I can appeal. But right now we're just sort in this flux where I'm waiting for the documents and there's no petition to revoke on anybody's plate, so I don't know what we would do. We would all show up and I would say I don't have anything. I'm still waiting for the documents every day until I get the documents, or the period for the petition runs out. For the petition to revoke runs out.

HEARING OFFICER INGEBRITSEN: I just want to -- I understand your position and I just want -- you're not planning on called any employee witnesses?

MS. KASETA: Not at this point. Not until after I've reviewed the documents.

HEARING OFFICER INGEBRITSEN: And what is your evidence?

And I understand you've requested documents from the Union regarding any communication about -- between the Union and other employees about this conduct. Is that correct? And they've responded to that subpoena request?

MS. KASETA: The Union has, yes.

HEARING OFFICER INGEBRITSEN: The Union has. You do not at this point have any evidence regarding any employee knowledge at these two locations of misconduct?

MS. KASETA: I don't have any employee that I could call to testify who can at this point in time would be willing at this point in time testify about employee knowledge at those sites.

HEARING OFFICER INGEBRITSEN: Well, it's not whether they're willing to, it's whether they're -- I mean we can issue a subpoena and have them.

MS. KASETA: Well, I don't know if they would testify accurately then. I guess that's the way I would say it. But I will know once I have the documents.

HEARING OFFICER INGEBRITSEN: So I guess I'm a little confused because there are other ways that employees can learn about conduct other than just through documentation. And you're not planning to put on any evidence regarding any communications between individuals? It's all document related?

MS. KASETA: I just don't know until I have the documents I subpoenaed exactly what evidence I'm going to present, or

what employees I would call. You'll note, for example, that we filed an objection, at San Fernando Advance, that explains that employees there were so intimidated and coerced by their co-workers who supported the Union, that they would not -- they did not feel comfortable expressing how they felt. And the concern of the Employer is that --

HEARING OFFICER INGEBRITSEN: I'm sorry that objection -- is that an objection to an issue in this case?

MS. KASETA: No, it's not at issue in this hearing. It is at issue in this case. We'll be appealing the Regional Director's ruling on our objection. But the point is that I could issue subpoenas to all those employees, but if they've been threatened or if they feel intimidated, I want to also review the related documentation, because I think that would prove whether or not that is the case, especially where I know there are employees who have already expressed that they are literally too scared to share their true feelings at their work sites. So I don't think that employees -- first of all, they're not the only evidence and in a situation like this, where you're talking about a concern if people have been intimidated and threatened, it's not the best evidence.

HEARING OFFICER INGEBRITSEN: Counsel for the Union, do you have any response?

MS. HOFFMAN: My response is that the Employer made an offer of proof in support of its objections, and it hasn't

presented any of the evidence here, and it doesn't seem to plan to unless they get secondary evidence related to subpoenas. Again the whole issue was whether the bargaining unit at issue were aware of false police reports being filed against individuals who refused to support or communicate with the Union. They don't seem to be wanting to ever provide evidence on this. So that's why we're here. First of all, I don't even know -- first of all, we don't even know anything about these police reports, because the Employer hasn't even provided that.

MS. KASETA: I don't have that. That's what the subpoena's for.

MS. HOFFMAN: You said that you have evidence that site managers and other employees would testify that during the organizing the campaign that the police came to their house. We don't have any evidence of that. I don't even know if there are police reports. So you're the ones who's put into issue where the police came to someone's house in response to a false police report and you stated that you would put evidence on of that and to date we don't have any evidence of that, and the Employer doesn't even plan to put on the evidence of how it affected the current bargaining unit.

MS. HOFFMAN: May I respond briefly?

HEARING OFFICER INGEBRITSEN: You may.

MS. HOFFMAN: The evidence that we set forth in our offer of proof does exist, but it doesn't go the question that's

raised by the Regional Director's ruling setting this hearing for objections. The question of whether -- and I don't disagree with Union's counsel that the Regional Director has said that the question of primary importance here is the connection to the election at San Fernando Interventional and San Fernando Advanced. That's information I'm still trying to obtain by way of my subpoenas. I mean I think we're kind of at a locker head's here. And it doesn't make sense to continue day to day.

HEARING OFFICER INGEBRITSEN: Okay. I'm going to take a brief recess off the record to consider this issue and I'll make my ruling when we go back on the record.

(Off the record at 1:29 p.m.)

HEARING OFFICER INGEBRITSEN: We're back on the record. I would like to make it clear that I have authority to rule on the motions to enforce the subpoenas that are still outstanding, and I have ruled on those motions on the record and denied enforcement. So those subpoenas that comprise Employee Exhibit 3 and Employee Exhibit 4 will not be enforced by the Region.

I would like to ask the Employer, I know you have requested additional subpoenas. I would like to ask the connection between these subpoenas and the elections at matter in the hearing. Specifically, what is the offer of proof that these subpoenas will show that there was a general atmosphere

of fear at these two locations that would prevent a free and fair election?

MS. KASETA: The documents that will be requested with these subpoenas will be similar in nature to the documents requested by the first set of subpoenas. One of the new subpoenas will go to the LAPD to expand the scope of the original subpoena duces tecum. In light of the testimony and documentary evidence produced by the NUHW as part of their subpoena response today.

I'll also be subpoenaing those individuals whose names I learned through the testimony and documentary evidence produced by the Union today. The connection between that and the hearing --

HEARING OFFICER INGEBRITSEN: I'm sorry the individuals. Can you specify what individuals?

MS. KASETA: Yes, I can. It would be Christian Mergia, Keegan Cox, Peter Clayton or Pete Clayton, and Joe Salice.

HEARING OFFICER INGEBRITSEN: And this is outside of what has already been presented and provided by the Union and their subpoena?

MS. KASETA: Yes. While the Union was -- the subpoena that I give to those individuals may be shorter in nature because some documents that would have been response are going to be encompassed by the search that NUHW undertook, as Ms. Mendoza testified to about. But there are some things stored

on personal devices or retained personally by those individuals that I would be seeking, now that I have their names.

All of that has the same relevance as the first batch of subpoenas did. Which is to say that there would be potential documentary evidence of those individuals speaking with employees of either San Fernando Interventional or San Fernando Advance about these police reports, that may illustrate that employees were intimidated or threatened, or otherwise coerced in connection with the police reports.

HEARING OFFICER INGEBRITSEN: I suppose I'm struggling to understand why those documents would show that rather than testimony from employees at the actual location. That being said I presented you with the subpoenas to use. Like I stated, delays, postponements are rarely granted in these hearings. Both parties have been warned that the hearing will continue on consecutive days because of the matter's urgency.

Counsel for the Union I know that you said you have a hearing tomorrow. I know that you had said that the Employer had requested a continuation. Do you have an update on that?

MS. HOFFMAN: As far as I know, there is no request for a continuance for tomorrow's hearing.

HEARING OFFICER INGEBRITSEN: Okay. Have you made any efforts to see whether you can move that hearing?

MS. HOFFMAN: No, I have not, but I don't understand why if the Employer isn't going to present the employee witnesses,

I don't know why I should have to move that hearing.

HEARING OFFICER INGEBRITSEN: Well, like I said you've both been -- it does not appear to me that the new subpoenas contain significant difference, contain requests that could not have been requested earlier. And in some cases, it seems like they were requested earlier of the same parties.

MS. HOFFMAN: For the record I want to say that there was a continuance of this hearing, to accommodate the Employer with their subpoenas. So the original hearing was schedule for last week.

HEARING OFFICER INGEBRITSEN: Well, you know, I need special circumstances to postpone a hearing. And I need to know whether you can -- Ms. Hoffman, whether you can move your hearing.

MS. HOFFMAN: I don't know why I'm continuing something. We had the hearing today. So why am I continuing until tomorrow. We're not done with today. We have the rest of the day. I'm here until 5:00 or even longer.

HEARING OFFICER INGEBRITSEN: Well, we have issued subpoenas today to the Employer for their use. I believe it's too late in the day to require them to serve the subpoenas today and have those individuals show up today. So --

MS. HOFFMAN: They're their employees. They're not issuing -- the subpoenas that they're having for today, are the same subpoenas you just said you weren't going to enforce, so I

don't understand what we're here about. They're not serving subpoenas on their own employees to come to the hearing. They haven't even asked those employees to come to the hearing. They're the ones who have the burden of proof. They are choosing not to bring any employees to this hearing to testify to the relevant objection. So why do I have to come back tomorrow for subpoenas that are going to be more subpoenas that involve the same issue that you weren't going to enforce today.

HEARING OFFICER INGEBRITSEN: Well, the hearing was scheduled for one to two days.

MS. HOFFMAN: Okay, well, as soon as it was rescheduled. Because you have to understand you had a government shut down on Monday. You took it off calendar. As soon as it was rescheduled, Region 21 rescheduled my hearing from last Thursday to Tuesday and I notified the Region. No one asked when it was rescheduled again until Monday. No one asked me about it. But I got a hearing scheduled at Region 21 tomorrow. But I don't understand why we need to come back today, when we have three hours left today. And we've been dancing around this for like three hours. You asked them to take a ten-minute break to find out whether they were going to call the employees. They came back after the subpoena issue again, and said no. So if they're not going to call the employees, why do we have to come back tomorrow?

HEARING OFFICER INGEBRITSEN: I mean I understand your

concern. These subpoenas have been requested and I do want to --

MS. HOFFMAN: I've never had the Board ever continue any of my hearings based on me requesting subpoenas. I never have. That's great to know. Because from now on when I have a hearing and I can't serve the subpoenas I'm going to ask for continuances of all my hearings. So it's really nice of you to accommodate them. I've never heard anyone ever complain that they couldn't put the right hearing date on it, when they put the hearing date on it. I mean, and the subpoenas are duplicative of what was already subpoenaed. No one from NUHW has any records regarding police report. And it still doesn't go to the issue of how employees even knew about it. And that's what we're here for.

HEARING OFFICER INGEBRITSEN: So Ms. Hoffman, I'm asking to see if you can establish special circumstances that would allow me to move the subpoena or move the hearing date to something that better suits you. It doesn't seem like you're able to give me any of those.

MS. HOFFMAN: I said I could do -- I can't do it tomorrow, but I could do it the following day.

HEARING OFFICER INGEBRITSEN: Okay, have you made any efforts or any requests to move the hearing tomorrow to a different day?

MS. HOFFMAN: I have not made any requests to move it to a

different day. But I don't understand why the Region 21 is going to agree to move my hearing for tomorrow to a different day when you won't agree, and you're the one who put it into the position of needing to move it. And I don't know why we're moving it, because we haven't put on any evidence -- the Employer has virtually put on any evidence today with regard to these objections. In fact there's been no evidence that they put on with regard to the objections, except that they served the subpoena, which I would have agreed to whatever the person on the proofs of services. So I don't even know why we needed that witness.

MS. KASETA: Well, that witness --I understand we could have stipulated, but regard to the other two entities subpoenaed there would be no one here to stipulate, so I needed to call the courier. I would ask that the Region consider the circumstances to be special circumstances. I mean I am inclined to agree with counsel for union that doesn't make sense for us to reconvene on every consecutive day because we'll accomplish nothing. I've told you and I mean it on behalf of the Employers, we are not calling witnesses until we get documents. So it is a waste of everyone's time to come back every day and see if there's documents.

HEARING OFFICER INGEBRITSEN: Are you talking about documents for --

MS. KASETA: Responsive to the subpoenas that are already

outstanding.

HEARING OFFICER INGEBRITSEN: Those have been ruled on.

MS. KASETA: They're still outstanding. You said you won't enforce them.

HEARING OFFICER INGEBRITSEN: They will not be enforced in this proceeding. You can appeal that to the Regional Director in your decision, but you are not getting documents regarding those subpoenas in this hearing.

MS. KASETA: Then you're revoking them, essentially?

HEARING OFFICER INGEBRITSEN: I am ruling on the motion to enforce and denying your motion to enforce.

MS. KASETA: Enforcing them in a district court is an entirely different thing than them being outstanding. They're currently outstanding. You're telling me that you won't enforce them. That's fine. But someone might still show up tomorrow and bring me the documents. And there's nothing you can do about that. But it's really silly for all of us to come here every day while nobody shows up to bring the documents. When we could just say, okay, the date by which they would have to file a petition to revoke is Friday. If we don't have anything by Friday, the Board's not going to enforce the subpoenas, ergo there's not going to be any other evidence for me to present. I accept that. I understand that's what you're saying the Board has a right to do. I don't know if I agree with that. But during that period if you are telling me

I will never get documents for these subpoenas, you are effectively revoking them. And if that's the case then I don't have other evidence to present. I would like the opportunity to issue my other subpoenas, but if you're just going to refuse to enforce those as well, and it's your position that that's allows you to essentially revoke and close the hearing, then just take the position because my client's already been prejudiced by your position on the set that's already out there.

HEARING OFFICER INGEBRITSEN: While I understand both parties' positions and frustrations, counsel for the Employer has had plenty of time to issue subpoenas. We did reschedule this hearing and postponed it. And they have had the subpoenas for quite some time, and they should have been ready to put on evidence today of that dissemination, which they have not done. So I am continuing it. Neither party has shown special circumstances for a postponement. And we will continue the presentation of evidence tomorrow, as scheduled, as stated. And if we cannot put on evidence regarding the dissemination and knowledge of employees of misconduct at that time, I will make a ruling on the Union's motion to dismiss the objection. So I am adjourning the hearing until tomorrow at 9:00 a.m.

MS. HOFFMAN: And what will be the status of -- how would your ruling -- I guess you would rule on the objection. Your plan is we'll come here tomorrow, and either people will show

up from LAPD and IAM or they won't. And if they don't then I'll say I don't have any evidence to put on. And at that point in time, you would rule on a motion to dismiss the objection.

HEARING OFFICER INGEBRITSEN: Correct.

MS. KASETA: Okay, even though there's outstanding subpoenas.

HEARING OFFICER INGEBRITSEN: Like I said, the Employer has had plenty of time to issue these subpoenas. It's before the five-day period. Because you waited until Friday does not mean that we need to push back the hearing.

MS. KASETA: Okay, I understand that you'd be taking your position, I guess, that the subpoenas were untimely, even though there's no petition to revoke them.

HEARING OFFICER INGEBRITSEN: I'm not taking any position right now, I will make my ruling on anything that's still outstanding tomorrow. And that's that. So if neither side has any more evidence to put on today, based on the subpoenas that have been requested by Employer's counsel, I believe that it's necessary to continue tomorrow. And we will do so. So we are going to close the record for the day.

(Whereupon, the hearing in the above-entitled matter was recessed at 2:18 p.m. until Tuesday, January 30, 2018 at 9:00 a.m.)

C E R T I F I C A T I O N

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 31, Case 31-RM-209388, 31-RM-209424, RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center, and RadNet Management, Inc. d/b/a San Fernando Valley Imaging Center, and National Union of Healthcare Workers at the National Labor Relations Board, Region 31, at the 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064, on Monday, January 29, 2018, 9:28 a.m. held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

Davette Repola

on behalf of eScribers

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center,	**Case Nos.**	**31-RM-209388** **31-RM-209424**
and		
RadNet Management, Inc. d/b/a San Fernando Valley Imaging Center,		
and		
National Union of Healthcare Workers.		

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Place: Los Angeles, California

Dates: January 29, 2018

Pages: 104 through 127

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of: RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIAL RADIOLOGY AND IMAGING CENTER, and RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY IMAGING CENTER, and NATIONAL UNION OF HEALTHCARE WORKERS.	Case Nos. 31-RM-209388 31-RM-209424

The above-entitled matter came on for hearing, pursuant to notice, before **SARAH C. INGEBRITSEN**, Hearing Officer, National Labor Relations Board, Region 31, at the 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064, on **Monday**, **January 29, 2018, 9:28 a.m.**

A P P E A R A N C E S

On behalf of the Employer:

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E X H I B I T S

EXHIBIT	IDENTIFIED	IN EVIDENCE
Board:		
B-1(a) through (m)	15	15
Employer:		
E-1	15	15

P R O C E E D I N G S

HEARING OFFICER INGEBRITSEN: Okay. So I'd like to make a separate subpoena record for case -- in the matter of case 31-RM-20942 and 31-RM-209388, pursuant to an order of the Regional Director dated January 12th, 2018. The parties in this record are the same as the parties in the general hearing for the above referenced cases.

We are dealing with subpoena issues regarding subpoena B1ZPB8FR, which is the same, substantively, as B1ZPB8Q1; is that correct?

MS. KASETA: No.

HEARING OFFICER INGEBRITSEN: Oh, I'm sorry.

MS. KASETA: As B-1ZPBFG9.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. KASETA: The two subpoenas served on the custodian of the records are the same.

HEARING OFFICER INGEBRITSEN: Understood. Thank you. Okay. So counsel for the Employer, if you could begin your discussion regarding the subpoena. Thank you.

MS. KASETA: Sure. I think the parties were -- had addressed many of the issues of the record, but for the purpose of the record, we were going to put the Union's responses to these two subpoenas on the record. And I would defer, obviously, to Union's counsel to respond on behalf of the Union to the requests. I think we can address them by number because

we've noted which subpoenas they are.

HEARING OFFICER INGEBRITSEN: Okay. All right. So I can just -- I will try to summarize what the discussion off the record. It appears that the Union has produced all documents in its possession with exception to 1 and 3. For number 3, the Union has produced the requested documents with the exception of the current home address to the individuals to the Union; is that correct?

MS. HOFFMAN: That's correct. But there's one thing that I have to respond to in that regard. In the definition of Union, the Employer's definition in number 4 is overly broad. So I can only respond on behalf of the National Union of Healthcare Workers and not -- there are no related or affiliated entities, but it also says, "Not limited to the International Association of Machinists and Aerospace Workers, together with all former and current officers and employees thereof, and any outside persons or entities retained to act on their behalf."

So with that overly broad definition of union, we still don't have any documents, except for the ones that we provided that even refer to any other union or NUHW. But I only have access to NUHW's documents. And the subpoena is on NUHW.

HEARING OFFICER INGEBRITSEN: Do you have a response?

MS. KASETA: I would just respond, are there any known agents of NUHW? So for example, I mean, these are only staff

members. Is this list staff members who are employed by NUHW?

HEARING OFFICER INGEBRITSEN: That's correct.

MS. KASETA: Is Mr. Carrillo an employee of NUHW?

MS. HOFFMAN: Ryan is not an employee of NUHW.

MS. KASETA: Is he an employee of IAMAW?

MS. HOFFMAN: Yes.

MS. KASETA: And the rest of the individuals on this list?

MS. HOFFMAN: Oh, he's not an employee -- apparently, he's not even an employee of the International Association of Machinists.

MS. KASETA: Okay. The other individuals on this list, are they employed by NUHW?

MS. HOFFMAN: All the employees on that list are employed by NUHW. And Kegan (phonetic) is no longer employed by NUHW.

MS. KASETA: Was employed.

MS. HOFFMAN: He was employed at the time.

MS. KASETA: So that's no longer a good address for Kegan Cox (phonetic).

MS. HOFFMAN: It's our office address.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: Okay. So it would be our position that the response to number 3 is incomplete. Obviously, the Union is aware of some outside entities who worked for NUHW during the organizing campaign or assisted with the campaigning. And I would like, on behalf of the Employer is a complete list of all

those who had those kinds of -- had that kind of involvement. The reason why that's relevant is, again because it doesn't necessarily have to be the case that it was an NUHW employee by dint of who was on their paystub for them to have had an influential effect on employees. So Mr. Carrillo is a good example. But if there are others, I would request that those names be produced.

I also, given that Mr. Cox is no longer an employee, and since I won't be able to serve a subpoena on him at the business address, at least for that limited exception, I'd like the last known address for that individual.

MS. HOFFMAN: Well, in response to that, I still don't know the relevance because I don't -- we don't have any information that anyone at NUHW or the IAM filed any police reports. So --

MS. KASETA: So --

MS. HOFFMAN: -- and I'll make an offer of proof on Ryan Carrillo.

Is that how you pronounce his name? Say that again?

UNIDENTIFIED SPEAKER: Carrillo.

MS. HOFFMAN: Carrillo that he was a volunteer from the IAM in training with NUHW. So -- or the IAM sent him over for training. So -- but we still don't have any documents that indicate that he filed any police reports or involved with any police reports.

MS. KASETA: Does NUHW have access to his personal cell phone?

MS. HOFFMAN: Do we have his number? Is that what you're asking?

MS. KASETA: No. I'm asking do you have access to his personal cell phone? Can you read the text messages and the emails?

MS. HOFFMAN: No, he's not in the -- he's totally a volunteer. We wouldn't have access to his personal cell phone other than having his number, I would assume.

MS. KASETA: The fact that he's a volunteer doesn't mean that he's necessarily not an agent of NUHW, particularly, where he's working on their campaign. And so I think my subpoena to him, whether it goes to him at IAMAW, or whether I need to use a different address, it's clearly relevant because this is an individual that -- the same access as NUHW to these employees. And we don't know -- simply put, I understand that NUHW has responded to the subpoena. But we don't know what Ryan did on his personal cell phone, with his personal email, in his personal text messages.

MS. HOFFMAN: Again, until I know what their case is, it's purely speculative. So --

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: -- we have no access to his cell phone records, and he's not an agent of NUHW as far as --

HEARING OFFICER INGEBRITSEN: So it seems like we're talking about a different subpoena at this point, correct?

MS. HOFFMAN: Okay.

HEARING OFFICER INGEBRITSEN: We've moved onto --

MS. KASETA: Right. Right.

HEARING OFFICER INGEBRITSEN: -- okay. So that's --

MS. KASETA: Yeah. We've moved a little bit afield, but the point is that I would like a complete list of all the people who are similarly situated to Ryan Carrillo because those people -- yes, we're talking about the question of relevance of the subpoena to Ryan Carrillo. But my point is, just like there's relevance to the subpoena to Ryan Carrillo, there's a relevance to the subpoenas of anyone who would be on this list of people who were involved in the Union's organizing campaign, not just the people who were employed by NUHW.

HEARING OFFICER INGEBRITSEN: Okay. So is it --

MS. HOFFMAN: Again, they're not entitled to that information until they actually have some kind of evidence they did something wrong. Again, people have a first amendment right to engage in -- to help a union, to be part of a union, to be involved. Unless they have some kind of evidence that someone did something, then I don't know what we're talking about. It's speculative.

I could give them every supporter of NUHW that, you know, in California. I don't know what it is that -- what they're

alleging that they did. So, you know, it's not relevant until the Employer puts on their case, as far as I'm concerned.

HEARING OFFICER INGEBRITSEN: So with regard to number 3, Employer, is it your position that you have not received a full response to this?

MS. KASETA: That's my position.

HEARING OFFICER INGEBRITSEN: Okay.

And Union Counsel, what is your response? We don't have a motion to strike or partially revoke on the records.

MS. HOFFMAN: Well --

HEARING OFFICER INGEBRITSEN: Is --

MS. HOFFMAN: -- first of all, we're voluntarily complying today to make this hearing go faster because it wasn't served until Friday. And we have five days to file a petition to revoke. We produced what we believed is all the relevant evidence that we have. And as far as I'm concerned, number 4 is overly broad. Well, number 4 in their definitions is overly broad.

So it makes all of this very difficult to comply with when we couldn't -- respond on behalf of current and former employees of the National Union of Healthcare Workers. But I can't respond on -- there are no other affiliated entities. So when they lump the machinists into this, they're not an affiliated entity.

As far as Ryan is, we'll make an offer of proof that he

did volunteer to work on this campaign. And if there's some kind of evidence against him, then we can address that at that time. But we don't have anything.

HEARING OFFICER INGEBRITSEN: Okay. And then -- so I understand that there is still an outstanding issue regarding number 3. Regarding, and I am going to right now move on from number 3 and we can come back to it after the presentation of evidence to determine to what extent this document -- this information is relevant.

Regarding number 1 in this subpoena, it's my understanding that the Union -- that the Employer has requested that I review in-camera documents from the Union regarding this type of communication.

The Union, do you -- what is your position with regards to number 1 of the subpoena?

MS. HOFFMAN: We have those documents here. Our position is until we understand what the Employer's case is, we're not sure of the relevancy. And because first of all, again, the only information we have is for employees at other facilities, so not at the two facilities that are subject of this RM petition. And until the Employer puts on evidence that the employees at this facility were affected by whatever happened or -- I don't -- we're not sure of the relevance of these particular --

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: -- emails or text messages.

HEARING OFFICER INGEBRITSEN: So to be able to rule on the relevancy, are you making a motion to partially revoke number 4 of the subpoena on the record, or --

MS. KASETA: I believe it's number 1.

HEARING OFFICER INGEBRITSEN: Or I'm sorry, number 1, thank you.

MS. HOFFMAN: Yes, we're making a motion to partially revoke because the only evidence that we have involves employees that are not from the facility that are subject of these objections.

HEARING OFFICER INGEBRITSEN: Okay. And Employer, what's your position on that motion?

MS. KASETA: Sure. Our position is the information we sought is relevant. The police reports that we're aware of at this time do involve employees at other facilities, as well as other facilities themselves, by which I mean the police were called to the actual center. So the evidence that we're -- the link we're seeking here is not necessarily directly between the police reports and employees of San Fernando Interventional and San Fernando Advanced, but to other employees within the same region.

The reason why that is relevant is because as the regional director expressed in her ruling on the objection, the core question here. Although, we think there is a real question

about who was responsible for these police reports. And we think there is an obligation on the part of the Board to delve into that question when there's a question of a potential violation of another law. The Board does have some duty and responsibility for trying to steer that in the right direction.

But setting that question aside and focusing on what the regional director said in her ruling on this objection was that the relevance -- the relevant question is whether or not an employee -- any employee at SFI, San Fernando Interventional or San Fernando Advanced, was harassed, coerced, intimidated, felt threatened, as a result of these police reports. We would be able to find that out by finding out if there were linkages between individuals who were subjected to the police reports and the Union; i.e. individuals contacted the Union and said we don't want to be represented by the Union, and then, the next day the police showed up at their house.

And if that causal connection exists, it's certainly relevant, not only to the first part of the test that the Employers still maintain is relevant, despite the regional director's ruling, but also, the second part, which is whether employees were intimidated, which relates to whether they found out from the Union or any other source, or any volunteer, agent, or other individual associated with the Union that when people called and said they didn't want to be represented by the Union the police started showing up at their house every

week for four weeks.

HEARING OFFICER INGEBRITSEN: Okay. Noted. Thank you. Are there any other issues regarding the subpoenas issued to the National Union of Healthcare Workers and/or Sophia Mendoza?

MS. KASETA: No, because it's my understanding, and I would just like for the sake of the completeness of the record, it's my understanding that the Union and Ms. Mendoza represent that there are no responsive documents in their possession for any of the other requests; is that correct?

MS. HOFFMAN: That's correct.

HEARING OFFICER INGEBRITSEN: Thank you.

MS. KASETA: And that's on behalf of both the custodian and Ms. Mendoza?

MS. HOFFMAN: Yes.

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: Okay. I'm going to defer my ruling on the petition to revoke regarding number 1 until after testimony has been presented, when it becomes apparent whether the subpoenaed information is necessary and/or relevant.

For the subpoena record, I would like to introduce, just for the sake of completion, a separate copy of the formal papers and the subpoena at issue. Do you have a -- Employer's counsel, do you have a copy of that subpoena that we could -- or --

MS. KASETA: I think it's in Employer's 1 that I just gave

to you.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: All the subpoenas are in there.

HEARING OFFICER INGEBRITSEN: Is there any objection to entering Employer's 1 into the subpoena record?

MS. HOFFMAN: No.

HEARING OFFICER INGEBRITSEN: Counsel?

MS. KASETA: No.

HEARING OFFICER INGEBRITSEN: Okay. And I believe -- does the court reporter also have a copy?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: Okay. So with no objections, I enter Employer 1 into the subpoena record.

(Employer Exhibit Number 1 Received into Evidence)

HEARING OFFICER INGEBRITSEN: Is there any objection to entering the formal papers into the subpoena record?

MS. KASETA: No.

MS. HOFFMAN: No.

HEARING OFFICER INGEBRITSEN: Okay. And so I enter -- hearing no objections, I enter the formal papers into the subpoena record.

(Board Exhibit Number 1(a) through 1(m) Received into Evidence)

HEARING OFFICER INGEBRITSEN: Counsel for the Employer, I'm sorry, is -- were the proofs of service attached to the subpoenas?

MS. KASETA: No. I was going to enter them in through the courier who served them and signed the subpoenas. I mean, they were attached, but as blank copies. And they were signed by the courier before the hearing today.

HEARING OFFICER INGEBRITSEN: Okay. I'd like to get that into the subpoena record.

MS. KASETA: Sure. So the copies that I have are all of the subpoenas because they were all served by the same courier. And you're going to need -- I would imagine you're going to want the rest of them anyways.

HEARING OFFICER INGEBRITSEN: Yes.

MS. KASETA: So they're all going to be Employer's 2.

(Employer Exhibit Number 2 Marked for Identification)

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: But these -- this is inclusive of the NUHW subpoenas and obviously, they all have a corresponding number on them so you'll be able to identify what went to who.

HEARING OFFICER INGEBRITSEN: Okay. Thank you. And counsel, I'm sorry, I believe you said this, but are these just the subpoenas at issue regarding the subpoenas to the National Union of Healthcare Workers and Ms. Mendoza or are these all-inclusive of your subpoenas?

MS. KASETA: It's a full set of all the subpoenas that were served by the Employers. So the first eight are the ones that were served on NUHW.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: And then, the next eight are the IAM. And then, the final four are LAPD.

HEARING OFFICER INGEBRITSEN: Just as to not confuse the record because we are only discussing the two -- or I'm sorry, the eight subpoenas at issue for Ms. Mendoza and then National Union of Healthcare Workers, and because those are the two -- the parties that are present, I'm going to request that we only include the eight proofs of service for those subpoenas in this subpoena record because it's the only one that -- because we're only addressing those subpoenas. Is that okay?

MS. KASETA: I've got -- it's totally up to you. I assumed on the subpoena record we'd talk about the other subpoenas as well, but are the other subpoenas just going to be addressed on the regular hearing record?

HEARING OFFICER INGEBRITSEN: So do you feel like you need to address the subpoenas before we do any presentation of evidence?

MS. KASETA: The only witness I'm prepared to present without receiving the documents from the subpoenas is the courier who served the subpoenas to establish that service was made on LAPD and IAM.

HEARING OFFICER INGEBRITSEN: There's no evidence regarding dissemination to employees who were at the two facilities that you can put on prior?

MS. KASETA: No. I'm going to be putting on what -- based upon the documentation that I received from those individuals I'm going to decide who I need to put on. And yes, there are employees who were subjected to police reports, but I'm not going to -- you know, it's common thing that they wouldn't be thrilled about testifying about those matters unless it's necessary. So I'm not going to call them unless it's necessary. So I need the documents first.

HEARING OFFICER INGEBRITSEN: Okay. Employer, what's your position -- or I'm sorry, counsel for the Union, what's your position?

MS. HOFFMAN: Well, the Employer has the burden of proof on these objections. And it's not just the subpoenas that this case is based upon. I mean, the offers of proof made to support the objections I would assume that they would have testimony on that. And that this would just corroborate. The subpoenas are corroborating whatever this evidence was that they submitted as an offer of proof. So are they saying that the -- so it seems to me they have the burden of proof, and the subpoenas are not enough.

And on top of everything else, once again, the objections were issued on January 12th. So I don't know why they waited until Friday to serve the subpoenas on LAPD or on the IAM. So we're here because we want to get this over with, but we're -- you know, this is -- the Employer has the burden of proof. So

that would be insufficient evidence just to have the courier testify today.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: May I briefly respond to that?

HEARING OFFICER INGEBRITSEN: You may.

MS. KASETA: I understand that the Employer has the burden of proof, and our offer of proof does present evidence regarding the police reports that were filed and discussions that were had. But it is not uncommon that employees do not want to testify in these proceedings, particularly where they are intimidated or harassed, feel harassed by another organization, potentially, or are just scared and confused.

And so I'm not presenting any employees, and I'm not going to force by way of subpoena, anyone to show up here when I can get the same evidence, in documentary form, from the LAPD and the IAMAW. And I understand the Union says that they don't have any documents, but they can't speak on behalf of those other two organizations.

The question of why were the subpoenas issued on Friday, I don't think is one that Florice has the right to make that argument on behalf of those other parties. They'd have to petition to revoke if they thought the subpoenas were untimely.

HEARING OFFICER INGEBRITSEN: Uh-huh.

MS. KASETA: But to respond to the question since it's been raised a few times, even though the objection's issued on

the 12th, there was a decision to postpone the hearing at our request. That issued on the 17th. So the subpoenas issued on the 17th because they had to have the correct hearing date. Then, the subpoenas were in preparation, but the government shut down. And so we had to wait because this case was postponed, and we didn't know if we'd need a new set of subpoenas because the date had been cancelled.

We were told on the 23rd that they wouldn't -- it wasn't going to be postponed. We served courtesy copies on the 25th and got a courier out on the 26th. So that's the reason for the "delay," although, I'd argue that we moved pretty quickly given the set of circumstances here.

I understand the Union's position. They have every right to take the position they do. I understand that expediency is of importance to them, but for us, getting to the bottom of what happened to these employees and what the involvement of anyone associated in any way with this Union was is of the utmost importance over expediency. Certainly over expediency, and that should be the Board's position as well.

MS. HOFFMAN: May I respond?

HEARING OFFICER INGEBRITSEN: Yes, you may, and then I will --

MS. HOFFMAN: I'm going to say --

HEARING OFFICER INGEBRITSEN: -- make a determination.

MS. HOFFMAN: -- all the time, I have employees that don't

want to come to testify at objection's hearings because they're intimidated by their employer. But the Board throws out my objections or we withdraw them. Unfortunately, that is the case. They have the burden of proof so.

HEARING OFFICER INGEBRITSEN: Okay. So just to be clear, and I'm not sure the subpoena record is the most proper place for this, but that's what we're on so we're going to continue this conversation. To be clear, Employer, the only evidence that you're prepared to put on today, other than the subpoenaed documents, is testimony regarding the service of the subpoenas?

MS. KASETA: If the individuals subpoenaed had shown up, but I will -- I can question Ms. Mendoza. You know, their document production is limited because they don't have a lot of responsive documents. But I'll ask the few questions that I have for her of her, certainly. And I would have also called any of my subpoenaed witnesses. There are, you know, two to three other people who would have been called as witnesses based upon the evidence that they would have presented.

Aside from that, no, I'm not going to be calling any other witnesses today. But I do believe that I have a right to the documents that I requested. There is no pending petition to revoke the other two subpoenas. And I think that the record has to wait for those documents. I'm entitled to them at the beginning of this hearing at the latest.

I've been involved in a lot of cases where we get them

before the hearing, but I'll take them at the beginning. I don't think I am obligated, by any Board rule or any exigent law, to present my case without receiving responsive documents to these subpoenas. And if that means that we have to continue this hearing, so be it. But I'm not going to present my case until I have those responsive documents.

HEARING OFFICER INGEBRITSEN: Okay. Understood. I think we've gotten off the topic, a little bit, of the subpoenas, and that's my fault. I apologize. So I would like to pause the record on the subpoena record at this point, and go back on the record -- the regular hearing record.

(Whereupon, the hearing in the above-entitled matter was closed at 10:23 a.m.)

C E R T I F I C A T I O N

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 31, Case 31-RM-209388, 31-RM-209424, RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center, and RadNet Management, Inc. d/b/a San Fernando Valley Imaging Center, and National Union of Healthcare Workers at the National Labor Relations Board, Region 31, at the 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064, on Monday, January 29, 2018, 9:28 a.m. held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

Davette Repola

on behalf of eScribers

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center,	**Case Nos.**	**31-RM-209388** **31-RM-209424**
and		
RadNet Management, Inc. d/b/a San Fernando Valley Imaging Center,		
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Place: Los Angeles, California

Dates: January 30, 2018

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OFFICIAL REPORTERS
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of: RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIAL RADIOLOGY AND IMAGING CENTER, and RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY IMAGING CENTER, and NATIONAL UNION OF HEALTHCARE WORKERS.	Case Nos. 31-RM-209388 31-RM-209424

The above-entitled matter came on for hearing, pursuant to notice, before **SARAH C. INGEBRITSEN**, Hearing Officer, National Labor Relations Board, Region 31, at the 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064, on **Tuesday, January 30, 2018, 9:01 a.m.**

A P P E A R A N C E S

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E X H I B I T S

EXHIBIT	IDENTIFIED	IN EVIDENCE
Employer:		
E-6	114	114
E-7	115	115
E-8	115	115
E-9	116	116

P R O C E E D I N G S

HEARING OFFICER INGEBRITSEN: We're now back on the record in the hearing before the National Labor Relations Board in the matter of 31-RM-209424 and 31-RM-209388, pursuant to the order of the Regional Director dated January 12th, 2018.

Here for Employer is Ms. Kaseta and for the Union is Ms. Hoffman.

Is there any testimony or witnesses for the Employer to put on today?

MS. KASETA: No, unless someone shows up responsive to the subpoenas that I served. I do have the ad testificandums still outstanding, but I do not have any other witnesses that I would intend to call before --

HEARING OFFICER INGEBRITSEN: Okay. And did you issue new subpoenas yesterday that are --

MS. KASETA: Yes, I did.

HEARING OFFICER INGEBRITSEN: Okay. And it appears that those subpoenas have not been responded to.

Does counsel for the Employer wish for the Region to pursue subpoena enforcement on these subpoenas?

MS. KASETA: Right now I have served new subpoenas on Los Angeles Police Department. I'd like to put those in the record. I would like to pursue enforcement of these subpoenas. The rest of the subpoenas are prepared and ready to be served --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- but have not yet been served.

HEARING OFFICER INGEBRITSEN: So I'm going to -- I do not have a problem with entering the subpoena into the record. I'm going to ask the counsel for the Employer to state the basis for its belief that this new subpoena is going to provide probative evidence that the Employers and the unit in question knew of the conduct. And after I have this offer of proof, I will consult with the Regional Director regarding enforcement of the subpoena.

MS. KASETA: So the new subpoenas -- and after I give the offer of proof, I think it would make sense for me to put the new subpoenas that I have served and intend to serve on the record, just for the sake of the record and for your review. If you're going to decide whether to pursue enforcement, obviously I think you'd want to look at it.

The subpoenas for the LAPD are subpoenas that are requesting -- there's a subpoena ad testificandum from each Employer and a subpoena duces tecum from each Employer. I'm requesting additional documents from the LAPD. They're in the same vein as the first set of subpoenas to the LAPD, but they expand upon the requests.

Inasmuch as during yesterday's hearing, documents were produced to me by the Union that identified additional individuals who worked on the Union's organizing campaign, and

testimony was given about additional individuals who worked on or were associated with the Union's organizing campaign. And the subpoena to the Los Angeles Police Department is expanded to encompass any connection between the Los Angeles Police Department and those named individuals who I learned of yesterday.

HEARING OFFICER INGEBRITSEN: Okay. Understood. And also how -- what is your basis for the belief that the subpoena is going to uncover probative evidence that employees in the unit knew of the objectionable conduct?

MS. KASETA: Well, again, I think we've talked a couple times in the last two days about there being sort of a two-part test or standard here. Part one of that is establishing what occurred and who was responsible for it. And certainly the Los Angeles Police Department does go most directly to that question. But the second part of the test is did employees at San Fernando Interventional and San Fernando Advanced know about the conduct, and specifically these police reports. And part of the answer to that question would be determining whether or not any police reports involving any employees or addresses associated with employees at San Fernando Interventional or San Fernando Advanced were implicated in any police reports filed by any individual associated with the Union.

HEARING OFFICER INGEBRITSEN: I'm sorry. So you're asking

whether any employees who work at these two locations in question had police reports filed against them?

MS. KASETA: Yes. Because I'm aware of a certain set of police reports, but I don't know if I'm aware of all the police reports. I don't know that every employee subjected came forward to the Employer and said, hey, this is happening to me. So it's possible. And these subpoenas would establish whether it directly implicated any employee from San Fernando Interventional or San Fernando Advanced.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: And then there are three additional sets of subpoenas that I will also enter into the record. They have not yet been served. They've just been prepared. I'm arranging for service. They are to three of the four individuals whose identities I learned during yesterday's hearing. The three individuals are Joe Solis --

HEARING OFFICER INGEBRITSEN: I'm sorry. Could you repeat that? They are for four individuals?

MS. KASETA: There were four individuals I learned about during yesterday's hearing by way of the document produced to me by the Union in response to request three, and the testimony of Ms. Mendoza.

HEARING OFFICER INGEBRITSEN: Is that Employer Exhibit 5?

MS. KASETA: Correct.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: And so of the four individuals I learned about yesterday, I've prepared subpoenas for three of those individuals. The first individual is Joe Solis, the second individual is Peter Clayton, and the third individual is Cristian Murguia. The fourth individual, Keegan Cox, I could not prepare a subpoena for because the representation on the record from the Union was he no longer works for the Union. So I don't at this point have an address upon which to serve him with subpoenas.

HEARING OFFICER INGEBRITSEN: And from my recollection of the testimony yesterday, the first two individuals, Joe Solis and Peter Clayton, were the individuals who were not on the list but had attended a couple of meetings; is that correct?

MS. KASETA: According to Ms. Mendoza's --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- testimony --

HEARING OFFICER INGEBRITSEN: According to --

MS. KASETA: -- yes.

HEARING OFFICER INGEBRITSEN: -- Ms. Mendoza's testimony. And what is your -- what is the basis for your belief that these two individuals who have evidence probative of employee knowledge?

MS. KASETA: Hereto, I've issued a subpoena ad testificandum and a subpoena duces tecum. With regard to the subpoena ad testificandum, as these individuals were

involved in the organizing campaign, I'd like the opportunity to question them about whether they had any conversations with any employees of San Fernando Interventional or San Fernando Advanced about the police reports or the filing of any police reports.

Additionally, the documents I seek are similar to the documents sought in the subpoenas that were served on Sophia Mendoza and Ryan Carrillo. And the relevance is the same as the relevance of those documents. It again goes to whether there were any communications between these individuals and employees at either San Fernando Interventional or San Fernando Advanced.

HEARING OFFICER INGEBRITSEN: I understand the relevancy, but do you have any reason to believe or suspect that these conversations did occur between these individuals and the number units -- or I'm sorry -- employees in the unit?

MS. KASETA: Well, I know that there were a number of police reports filed. I know that employees spoke with the Union. And some of those employees who said they didn't wish to be represented by the Union anymore were ultimately the subject of the police reports. And so I would like the opportunity to question the individuals associated with the Union's campaign to determine whether or not they had any conversations that might have had the effect. I won't be able to tell you whether the Union's affiliates or employees had

these conversations until I have the opportunity to question them.

HEARING OFFICER INGEBRITSEN: And regarding Cristian Murguia, is the purpose of the subpoena the same --

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: -- and the offer of proof is the same?

MS. KASETA: Well, I would say -- I can say that for the subpoenas that will be served on Joe Solis, Peter Clayton, and Cristian Murguia, the relevance and the purpose are the same.

HEARING OFFICER INGEBRITSEN: Uh-huh.

MS. KASETA: And there's an ad testificandum and duces tecum to each individual from each Employer, and the content is similar. I wouldn't say identical just because there's --

HEARING OFFICER INGEBRITSEN: Uh-huh.

MS. KASETA: -- you know, minor changes with regard to the names and the identities. But very similar in content to those issued to Ms. Mendoza and Mr. Carrillo.

HEARING OFFICER INGEBRITSEN: I understand.

MS. KASETA: And you'll be able to see it. I have copies of everything, so we can just --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- put them on the record.

HEARING OFFICER INGEBRITSEN: Okay. So if you would like

to enter the subpoenas that are issued or have yet to be issued into the record, you can do so --

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: -- now. And then I will consult with the Regional Director regarding the subpoena that was issued yesterday.

MS. KASETA: Okay. Employer Exhibit 6 are a cover letter and the subpoenas issued to the LAPD.

HEARING OFFICER INGEBRITSEN: Thank you.

Counsel for the Union, do you have any objection to Employer Exhibit 6 being entered into the record?

MS. HOFFMAN: I have no objection to it being entered into the record.

HEARING OFFICER INGEBRITSEN: Okay. Hearing no objection, I enter a document marked Employer Exhibit 6 into the record.

(Employer Exhibit Number 6 Received into Evidence)

MS. KASETA: Employer's 7 is the subpoenas issued to Joe Solis -- or that will be, I should say. They have not yet been served.

HEARING OFFICER INGEBRITSEN: These have not yet been served?

MS. KASETA: That's correct. The LAPD subpoenas should be -- were scheduled to be served as soon as the officer could serve them today.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: But these have not. I haven't arranged for service on these yet.

MS. HOFFMAN: Did I miss somebody?

MS. KASETA: Did I miss somebody? Did I give you 7? Okay.

HEARING OFFICER INGEBRITSEN: Counsel for the Union, do you have any objection to this subpoena, Employer Exhibit 7, being entered into the record?

MS. HOFFMAN: No objection to it being entered into the record.

HEARING OFFICER INGEBRITSEN: Okay. Hearing no objection, I enter Employer's Exhibit 7 into the record, noting that the subpoena has not yet been served.

(Employer Exhibit Number 7 Received into Evidence)

MS. KASETA: Employer's Exhibit 8 are the subpoenas that I intend to serve on Peter Clayton, again, hereto. I have not yet served them.

HEARING OFFICER INGEBRITSEN: Okay. Counsel for the Union, any objection to the document marked Employer's Exhibit 8 being entered into the record?

MS. HOFFMAN: No objection to it being entered into the record.

HEARING OFFICER INGEBRITSEN: Okay. Hearing no objection, I enter Employer's Exhibit 8 into the record.

(Employer Exhibit Number 8 Received into Evidence)

MS. KASETA: Okay. Employer Exhibit 9 are the subpoenas

that I intend to serve upon Cristian Murguia. These two have not yet been served.

HEARING OFFICER INGEBRITSEN: Okay. Thank you.

Counsel for the Union, any objection to Employer's Exhibit 9 being entered into the record?

MS. HOFFMAN: No objection to it being entered into the record.

HEARING OFFICER INGEBRITSEN: Okay. Hearing no objection, I enter Employer Exhibit 9 into the record, noting that Employer's Exhibit 7 through 9 have not yet been served on the parties.

(Employer Exhibit Number 9 Received into Evidence)

MS. KASETA: That's correct.

HEARING OFFICER INGEBRITSEN: Is that the extent of the subpoenas?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: The only thing I'll note, and this doesn't have to be resolved before we break, there was an issue with Union request three, the Union's response to that. We have the list of staff and one volunteer, and I was looking for a more complete list. And I just think we need a ruling on --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- that. I don't know if you want to do that now or later.

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: I think there was a ruling on the employee volunteers that you wanted on record.

HEARING OFFICER INGEBRITSEN: In terms of the number --

MS. HOFFMAN: Oh.

HEARING OFFICER INGEBRITSEN: -- is that right?

MS. HOFFMAN: Okay.

HEARING OFFICER INGEBRITSEN: Yeah.

MS. KASETA: Yeah. I think there was --

HEARING OFFICER INGEBRITSEN: I remember a ruling on --

MS. KASETA: -- a ruling on the number when I asked Ms. Mendoza. But, you know, I'm still asking for a complete set, including employees, and I think the Union is opposed to providing that. So I think we just need a ruling to --

HEARING OFFICER INGEBRITSEN: Oh, so I'm sorry, I guess I misunderstood that. I did not think that your request included employee volunteers.

MS. KASETA: It does.

HEARING OFFICER INGEBRITSEN: Okay. So this is an issue, for the record, regarding subpoena B-1-ZPB8FR, and the related subpoena served by the other Employer.

And would your request include the home addresses of these employee volunteers?

MS. KASETA: We already have their home addresses.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: So I mean --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- I suppose I would just need their names, but --

HEARING OFFICER INGEBRITSEN: And the purpose of this information and the probative value that you believe would come from it?

MS. KASETA: It essentially goes to the same question, you know, as I just explained with the subpoenas. If there were individuals who were affiliated with the Union's organizing campaign, there's a strong possibility that an agency relationship between the Union and that individual was established. If that is the case and these employees spoke to their co-workers about these police reports on behalf of the Union, then their conversations would be relevant to proving the Employer's objections to the election.

HEARING OFFICER INGEBRITSEN: And do you have any reason to believe that there were conversations between employees at the units in question about this conduct?

MS. KASETA: I have reason to believe that there were coercive and intimidating conversations that occurred employee to employee, as explained in the Employer's objections. And I understand that that objection is not set for hearing today, but that fact is relevant to the question of whether it is possible that employees coerced and intimidated their fellow

employees with regard to their exercise of their Section 7 rights.

HEARING OFFICER INGEBRITSEN: And those conversations occurred in these two locations or in other locations that you have knowledge of?

MS. KASETA: That I have knowledge of, they occurred at San Fernando Advanced, and I can't say with certainty about San Fernando Interventional. But there were also some employees who -- there are a select group of employees who move from site to site who had complaints about individuals from San Fernando Advanced. And so it's possible that -- you know, word can travel between the sites.

HEARING OFFICER INGEBRITSEN: Okay. At this time I'm going to take a --

MS. HOFFMAN: Can I -- can I --

HEARING OFFICER INGEBRITSEN: Oh.

MS. HOFFMAN: -- respond first?

HEARING OFFICER INGEBRITSEN: Yes, you may.

MS. HOFFMAN: Okay. First of all, on the subpoenas that have been issued but not served on Cristian Murguia and Peter Clayton, I have spoken to both of them and they no records responsive to the subpoenaed request. And as far as the employee requests, I want to make it clear on the record that the Union has an unfair labor practice charge against the Employer for intimidating and harassing the Union supporters,

and the information request and these subpoenas are further intimidation of those employees. And they have the right to organize also under the National Labor Relations Act.

And the Employer has presented no evidence in this hearing that it said it would proffer with regard to employees that says that they were harassed and intimidated by anyone, and with regard to these police reports at all. So we're adding, the Employer has control over its employees and it's chose not to -- although it apparently got information allegedly for some employees, it chooses not to put any of these employees on the record. And the site managers who are their supervisors, they have chosen not to put on the record.

So it seems to me that the whole purpose of these subpoenas is to gain information about who the Union had support from and to further intimidate and harass those employees.

MS. KASETA: May I briefly respond?

HEARING OFFICER INGEBRITSEN: You may.

MS. KASETA: There's no intent to intimidate or harass employees. We're simply looking at proof of the Employer's objections.

You know, the question of Ms. Hoffman having reached out to Mr. Clayton and to Mr. Murguia doesn't satisfy the subpoenas. There are subpoenas ad testificandum. I'm entitled to a right to question them about their conversations. Just because they don't have documents that are responsive doesn't mean that they

didn't have conversations that are not documented.

And, you know, I would stress again we're not looking to harass or intimidate anyone. Our purpose is simply to prove up the objections, and that, you know, there are -- you know, we would not be retaliating. And, of course, there are procedures and mechanisms if any employee feels that they've been retaliated against as a result of any Employer knowledge. That's the whole purpose behind the Act, so --

HEARING OFFICER INGEBRITSEN: Okay.

MS. HOFFMAN: And one more response. Mr. Murguia and Mr. Clayton attended meetings prior to these dates, and they were meetings at the beginning of the organizing campaign. So they were in August of 2017. So they would have no relevant information with regard to these subpoenas, or conversations with employees regarding that. They had very minimal contact with the organizing group.

MS. KASETA: I respect Ms. Hoffman's representations and I'm not questioning them, but, respectfully, I do have the right to question those individuals directly about their involvement. I'm not required to take representations from counsel.

MS. HOFFMAN: As the Union has the right to question these employees that made these allegations that the Employer has as part of its objections, but the Employer is refusing to have them testify at this hearing.

HEARING OFFICER INGEBRITSEN: Okay. With all of those on the record, I'm going to now take a brief recess to consult with the Regional Director regarding the subpoena enforcements and to make my decision regarding number three of the subpoena that is outstanding.

So we will resume in approximately 20 minutes. Hopefully sooner. Off the record.

(Off the record at 9:24 a.m.)

HEARING OFFICER INGEBRITSEN: We are back on the record.

I will now make my decision regarding the motion to partially quash number three in subpoena B-1-ZPB8FR, issue to the custodian of records of the National Union of Healthcare Workers. The request is for the full names, current work addresses, and current home addresses of volunteer employees who engaged in any activity in support of the Union's efforts to organize the employees.

The Union has already provided information regarding Union employees who worked on the campaign. And the Employer is requesting that information for Employer's employees who also engaged in any activity regarding the Union's organizing campaign.

So the only objection set for hearing is the objection over the filing of the police reports and Union employee knowledge of these police reports. There is no evidence that this information in Exhibit 3 that's requested is relevant to

proving that objection.

After considering the Employer's offer of proof, I don't find that the Employer can establish the relevancy of item number three as to the objection set for hearing. There has been nothing proven that this information, which will, frankly, expose the Union's sentiments of nearly the entire unit, will provide evidence that any of these employees had conversations regarding the matter at issue.

So particularly in light of the sensitivity of the information request and the Section 7 rights at issue, I am sustaining -- I'm sorry -- granting the motion to partially quash the subpoena.

And to clarify for the record, the outstanding subpoenas that the Employer has issued, I'd like to go through each of the Employer exhibits and clarify which subpoenas are encompassed by those exhibits and the status of those subpoenas.

I'm sorry. It's just going to take me a moment since rifling through them.

Counsel, do you have another copy of Employer Exhibit 1, per chance? I just --

MS. KASETA: I don't know if I have another one, but I --

HEARING OFFICER INGEBRITSEN: You know, I think I can go through and figure out --

MS. KASETA: I can share mine with you, if that would be

helpful.

HEARING OFFICER INGEBRITSEN: I think I can -- sorry. I was just going through them yesterday, so they're a little unorganized, but --

MS. KASETA: No problem. I'm sorry I don't have another one.

HEARING OFFICER INGEBRITSEN: No, no.

MS. KASETA: Wherever the witness copy went from yesterday, that --

HEARING OFFICER INGEBRITSEN: I think I grabbed that one.

Okay. So if you could just go through these with me just for the sake of clarity.

MS. KASETA: Sure.

HEARING OFFICER INGEBRITSEN: So from my records, all of the subpoenas that the Employer has issued are encompassed by Employer Exhibit 1, Employer Exhibit 3, Employer Exhibit 4, and Employer Exhibit 6; is that correct?

MS. KASETA: That is correct.

HEARING OFFICER INGEBRITSEN: Okay. So starting with Employer Exhibit 1, I'm going to go through the subpoenas that I have that comprise Employer Exhibit 1. And if I miss any, I'm sorry. These might be out of order. So it --

MS. KASETA: Okay.

HEARING OFFICER INGEBRITSEN: -- might be a little confusing, but I can just --

MS. KASETA: If you go at a reasonable pace, I'll be able to keep up.

HEARING OFFICER INGEBRITSEN: Okay. So Employer Exhibit 1 consists of subpoena A-1-ZP9J8Z, subpoena A-1-ZPAIAN, A-1-ZPADXF, A-1-ZP9EW1, B-1-ZPBD7F, B-1-ZPB8Q1, B-1-ZPBFG9, and that --

MS. KASETA: The only other one that should be in there is B-1-ZPB8FR.

HEARING OFFICER INGEBRITSEN: Thank you. It's --

MS. KASETA: Which you may have pulled out to address --

HEARING OFFICER INGEBRITSEN: Oh. Oh, yes, yes.

MS. KASETA: -- request three.

HEARING OFFICER INGEBRITSEN: Thank you.

So it is my understanding that all of the subpoenas after my ruling on request three, and the subpoena that you just referenced, that all of the subpoenas have been complied with; is that correct.

MS. KASETA: Yes. That is my understanding based on the representations from the Union on the record yesterday and based upon your ruling.

HEARING OFFICER INGEBRITSEN: Okay. Thank you.

So moving on to Employer Exhibit 3, this exhibit consists of subpoenas A-1-ZP9NBN, A-1-ZPAHDB, A-1-ZPAAZL, A-1-ZP9ZXT, B-1-ZPBF05, B-1-ZPBFVT, B-1-ZPBAKZ, and B-1-ZPBBC7.

MS. KASETA: That's correct.

HEARING OFFICER INGEBRITSEN: Is that correct? Okay.

And the subpoenas that comprise Employer Exhibit 3 were served on the machinists and Ryan Carrillo at the office of the machinists.

And as I stated yesterday on the record after consultation with the Regional Director regarding these subpoenas, the Region will not be pursuing enforcement of these subpoenas because the Employer has not provided any offer of proof as to -- or any facts or evidence that would support its assertion that these subpoenas would reveal any probative evidence regarding whether employees in the two locations at issue have knowledge of the police reports that have been filed at other locations or against employees employed at other locations.

So that is the decision regarding the enforcement of the subpoenas that comprise Employer Exhibit 5 -- or I'm sorry -- Employer Exhibit 3.

Okay. Regarding Employer Exhibit 4, it's my understanding that this exhibit is comprised of -- is it only four?

MS. KASETA: Yes.

HEARING OFFICER INGEBRITSEN: Oh, okay. Thank you.

The following subpoenas: A-1-ZP9HUZ, A-1-ZPAOKH, B-1-ZPBEKV, and B-1-ZPB555; is that correct?

MS. KASETA: That's correct.

HEARING OFFICER INGEBRITSEN: Thank you.

These subpoenas were issued to the Los Angeles Police

Department, both ad testificandum and duces tecum, requesting information regarding calls made to specific -- regarding calls made regarding specific individuals and about specific locations, and calls from specific individuals.

As I stated on the record yesterday after consultation with the Regional Director, the Region will not be enforcing the subpoenas because the Employer has not shown any reason to believe that these subpoenas would reveal probative evidence of unit employee knowledge and that they are not necessary for the determination of the issue.

Employer Exhibit 5 was the list of employees, correct? So the other --

MS. KASETA: That's correct.

HEARING OFFICER INGEBRITSEN: Okay. So the other outstanding subpoena that has been issued by the Employer is contained in Employer Exhibit 6. Employer Exhibit 6 is comprised of the subpoenas A-1-ZUM7ZR, A-1-ZUMBIP, B-1-ZUMHQB, and B-1-ZUMIG5.

MS. KASETA: That's correct.

HEARING OFFICER INGEBRITSEN: Okay. Thank you.

And these subpoenas have been issued to the Los Angeles Police Department, both ad testificandum and duces tecum. The duces tecum request does expand upon the requests made in Employer Exhibit 4 to request calls made from other individuals that were associated with the organizing campaign.

After consultation with the Regional Director, the Region will not be enforcing the subpoenas that compose Employer Exhibit 6 because the Employer has not shown any reason to believe that these subpoenas would reveal probative evidence of unit employee knowledge of the conduct, and they are not necessary for the determination of the issue.

Regarding Employer Exhibit 7 and Employer Exhibit 8 and Employer Exhibit 9, which are composed of subpoenas not yet issued, these subpoenas are to Union employees associated with the organizing campaign. Because after reviewing the -- oh, no.

Have you -- I'm sorry. Just to clarify on the record -- let me just go back to my notes real quickly.

Okay. Because the Employer has not provided any offer of proof as to how these subpoenas -- or that these subpoenas are likely to provide probative evidence regarding employee knowledge, I will not be keeping the hearing open in order for the Employer to issue these subpoenas and to give five days for the subpoenaed individuals to respond.

I believe --

MS. KASETA: So does that ruling apply to Employer's 7 through 9?

HEARING OFFICER INGEBRITSEN: I'm getting to that.

MS. KASETA: Sorry.

HEARING OFFICER INGEBRITSEN: Yeah. No problem.

I believe that addresses all of the subpoenas that were issued or are pending to issue; is that correct?

MS. KASETA: Yes. If what your ruling -- on the outstanding subpoenas that haven't yet been served, if that covers all of the subpoenas in 7, 8, and 9, then, yes, those are all of the outstanding -- all the subpoenas that have been issued or would be issued in this case.

HEARING OFFICER INGEBRITSEN: Okay. So at this time, other than the subpoenas, is there any evidence that the Employer or the Union are prepared to present?

MS. HOFFMAN: No for the Union.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: For the Employer, I'll just take a minute on the record to say that my client objects to the rulings you've made on Employer's 1, 3, 4, and 6, as well as 7 through 9.

I want to be clear. A couple of times during your presentation of your rulings, you stated that I hadn't made an offer of proof. But I believe I was asked to and did make an offer of proof; it's just that I think that the Region is saying that they don't find that my explanation of the relevance to be satisfactory. I obviously disagree. I think I've stated the relevance for each of the subpoenas, and explained how it relates specifically to the issue in this hearing, which is the employees at San Fernando Interventional and San Fernando Advanced.

I understand your ruling. We'll appeal your rulings. We think that they're prejudicial to our client's ability to present evidence in support of the objections. They limit the evidence available to the Employers. The evidence was relevant.

And we also object to the concept that the hearing record can be closed on the basis of the Region's decision not to enforce the subpoenas where there's no motion to quash the subpoenas or petition to revoke the subpoenas.

That being said, it's an issue for appeal. I want to make sure our position is clear on the record.

With regard to the presentation of further evidence, I stand by my position that we're entitled to the documentary evidence and the witnesses that we've subpoenaed. But knowing that you ruled that we don't have the right to call those individuals or await their responses, even where subpoenas are outstanding and were ready to be issued today, I don't have any other witnesses to present at this time.

MS. HOFFMAN: May I respond?

HEARING OFFICER INGEBRITSEN: Yes.

MS. HOFFMAN: I did receive a motion to quash the machinists' subpoena, four motions to quash, that they said were filed in this case. I received a copy of them yesterday at 2:51 p.m. I don't know whether the Region did.

MS. KASETA: Well, I certainly didn't, and I'm probably

the --

MS. HOFFMAN: Okay.

HEARING OFFICER INGEBRITSEN: Uh-huh.

MS. KASETA: -- first person who should have been served with it.

MS. HOFFMAN: Okay. Well --

HEARING OFFICER INGEBRITSEN: Yeah. Yeah, I haven't been notified of --

MS. HOFFMAN: I'll --

HEARING OFFICER INGEBRITSEN: -- the --

MS. HOFFMAN: -- let them know.

HEARING OFFICER INGEBRITSEN: -- motion to quash either.

Okay. So while I note that the five-day period in regards to the subpoenas, both issued on Friday and issued today, has not concluded, I have consulted with the Regional Director, and the Region will not be enforcing the subpoenas for the reasons I have previously stated: The Employer has failed to present any facts or introduce any evidence that would directly or inferentially support its assertion that these subpoenas would reveal any probative evidence regarding whether unit employees in these two locations had knowledge of the police reports that had been filed at other locations or against employees employed at other locations.

As such, these subpoenas are fishing expeditions with no basis of belief or knowledge that they would provide any

probative information, and I will not keep the record open for several more days for the sole purpose of seeing whether any of the subpoenaed information or testimony is provided.

Secondarily, as previously noted on the record, the Employer was in receipt of these subpoenas and could have issued them well beforehand to allow the prompt presentation of its case in this hearing.

While I understand the Employer's position with regards to the effect of the government's shutdown, the subpoenas specifically allow for the rescheduling of the date of appearance.

I note with respect to the subpoenaed employees who work for the --

Oh, so you have not subpoenaed yet the individuals that you were stating yesterday that you were intending to, Stephanie (phonetic) and -- you're not subpoenaing them?

MS. KASETA: No, I'm not going --

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: -- to be subpoenaing them at this time.

HEARING OFFICER INGEBRITSEN: Okay. So I do note as well that the Employer has not attempted to call any of its site managers or employees to the stand who could testify about employee knowledge. And I find the Employer could have requested much of this information before they did, so --

Regarding the Union's motion to dismiss, the objection for

lack of evidence that it made yesterday, I will not address the motion on the hearing record, and I will instead make my decision in the Hearing Officer's report.

So I will give the parties a chance to make closing statements, if they wish, as I stated previously. But assuming there is no other presentation of evidence today, we will be closing the record.

So would either party like to make a closing statement?

MS. KASETA: I would.

HEARING OFFICER INGEBRITSEN: Okay.

MS. KASETA: As I previously stated, based upon the rulings, I think that the handling of this case by the Region has been prejudicial to the Employers.

There are not only outstanding subpoenas that haven't been responded to yet, but additional subpoenas that couldn't have been issued any sooner than they were. The evidence came to light during yesterday's hearing. I immediately requested additional subpoenas, I was provided additional subpoenas, I completed those subpoenas; service would have been completed on those subpoenas today.

What the Region has really done here is taken up its own motion to quash these subpoenas. They're doing so under the guise of having the power to do so because of their right to enforce these subpoenas in district court. As I've stated on the record before, those are different things. And my client

objects to the Region's abuse of power in this case.

It's furthermore an arbitrary decision to exercise its power in that manner, it's prejudicial to the client for obvious reasons because there are a number of outstanding subpoenas with evidence that's clearly probative and clearly relevant, as explained by me multiple times on the record in this case, the connection not only between these potential witnesses and the organizing campaign and the potential police reports, but also, as requested, the specific relevance as to employees at San Fernando Interventional and San Fernando Advanced. This Region should allowed the Employer to present that evidence. It should have had a chance to do. It hasn't.

Furthermore, I note that the statement prepared by you and the Regional Director, who you consulted with while on a break, is a blatant attempt to smear the Employers, and it's a de facto ruling on a motion that's not before you based on the untimeliness. The fact that you're mentioning when we served the subpoenas, when that wasn't brought forward to the Region by any party, is indicative of this Region's prejudice against my clients, and it's harmful to my clients, because, again, it's preventing them from presenting relevant evidence in this case that would support the Employers' objections. And we'll appeal these rulings.

And that's all I have for closing.

HEARING OFFICER INGEBRITSEN: Counsel for the Union?

MS. HOFFMAN: The Union agrees with the Region's rulings. But, in addition, the Union wants to state for the record that the Employer had every opportunity to present the pro-offered evidence that it supported in support of objection number two but those not to present that evidence.

And on top of everything else, the Employer had the information necessary for any supporting subpoenas because it knows the names of these alleged employees and the facility managers and had that information to be able to get that from LAPD in a timely manner at the time the subpoenas were issued. Even though the Union doesn't believe that it is probative, the Employer had that ability to get that information and had the ability to present its evidence that it chose not to present in these proceedings.

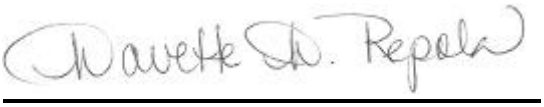
HEARING OFFICER INGEBRITSEN: Okay. Thank you.

With those closing statements, I now close the record in the hearing of the matters 31-RM-209424 and 31-RM-209388.

(Whereupon, the hearing in the above-entitled matter was closed at 10:17 a.m.)

C E R T I F I C A T I O N

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 31, Case 31-RM-209388, 31-RM-209424, RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center, and RadNet Management, Inc. d/b/a San Fernando Valley Imaging Center, and National Union of Healthcare Workers at the National Labor Relations Board, Region 31, at the 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064, on Tuesday, January 30, 2018, 9:01 a.m. held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



DAVETTE REPOLA

On behalf od eScribers

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC. D/B/A
SAN FERNANDO VALLEY INTERVENTIONAL
RADIOLOGY AND IMAGING CENTER

Employer/Petitioner

and **Case 31-RM-209388**

NATIONAL UNION OF HEALTHCARE
WORKERS (NUHW)

Union

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

This report contains my findings of fact, conclusions, and recommendations regarding the Employer RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center's (Employer) objections to the conduct affecting the results of the election in the above matter. For the reasons set forth below, I recommend that the Employer's objection be overruled in its entirety and that an appropriate certification issue.

I. PROCEDURAL HISTORY

The Employer filed a petition in Case 31-RM-209388 on November 3, 2017. The parties agreed to the terms of an election and the Region approved their agreement on November 9, 2017. Thus, pursuant to a Stipulated Election Agreement, the election was held on December 6, 2017. The employees in the following unit voted on whether they wished to be represented by the Union:

> Included: All full-time, regular part-time, and per diem Technical employees employed by the Employer at its facility at San Fernando Valley Interventional Radiology and Imaging Center located at 16311 Ventura Blvd., Suite 120, Encino, CA 91436;
>
> Excluded: All other employees, managers, confidential employees, physicians, service employees, office clericals, and guards and supervisors as defined by the Act, as amended.

The ballots were counted and a tally of ballots was provided to the parties. The revised tally of ballots shows that of the approximately six eligible voters, four cast ballots for the Union and two cast ballots against representation. There was one non-determinative challenged ballot and no void ballots. Thus, a majority of the valid ballots were cast in favor of representation by the Union.

On December 13, 2017, the Employer timely filed objections to the conduct of the election and conduct affecting the results of the election. On January 12, 2018, the Regional Director of Region 31 issued a Partial Decision on Objections and Notice of Hearing overruling all but one – Objection 2 – of the Employer's objections and ordering that a hearing be conducted to give the Employer an opportunity to present evidence regarding Objection 2. On January 12, 2018, the Regional Director of Region 31 further issued an Order Consolidating Hearings on Objections and Notice of Hearing consolidating the captioned case and Case 31-RM-209424 for the purposes of conducting a hearing on objections, ruling and decision by a duly assigned Hearing Officer.

Accordingly, pursuant to the January 23, 2018 Order Resetting Consolidated Hearing on Objections and Notice of Hearing, a hearing on the Employer's Objection 2 was held before the undersigned Hearing Officer in Los Angeles, California on January 29 and 30, 2018. At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, and to argue their respective legal positions.

The findings of fact, credibility resolutions and recommendations to the Regional Director contained herein are based upon my review and evaluation of all testimony in light of the demeanor of the witnesses, the logical probability of testimony, and the record as a whole. Where any witness has testified in contradiction to the findings herein, his or her testimony has been discredited as being in and of itself not worthy of credence or because it conflicted with the weight of other credible evidence.[1] Based upon my careful consideration of the entire record and all evidence presented herein, and the application of relevant case law, I make the following findings of fact, resolutions of credibility, and recommendations.

II. THE EMPLOYER'S OPERATIONS

The Employer provides diagnostic imaging services.

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at*

[1] See *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159 (1966).

Boca Raton, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984); see also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

IV. THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested.[2] Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objection 2: Objectionable Conduct

In Objection 2, the only objection at issue in this hearing, the Employer alleges that during the critical period, the Union and/or a third party harassed the Employer and eligible voters who had voiced opposition to the Union by filing false police reports against facilities

[2] Citations to the evidentiary record are as follows: Transcript [Tr. Page#], Board Exhibits [B Exh. #], Petitioner Exhibits [P Exh. #].

operated by the Employer and against eligible voters and that this conduct was sufficiently egregious as to require the setting aside of the election and the conduct of a new election.

In support of this objection, the Employer proffered that it would call three Site Managers and two employees who work at other facilities operated by the Employer to testify that, during the course of the organizing campaign, each had voiced opposition to the Union and/or refused to engage with the Union and that as a result, false police reports were filed against them. According to the Employer, the testimony of these individuals would establish that the witnesses were concerned and intimidated by the false police reports and that they discussed these false police reports with managers and employees at the facilities at issue in this case.[3] [B. Exh. 1(c)].

Record Evidence

The Employer presented two witnesses to testify, one to the service of the subpoenas issued by the Employer, Nelson Beltran, and one to testify to the underlying conduct at issue in its objection, Sophia Mendoza. Ms. Mendoza appeared pursuant to an individual subpoena ad testificandum and pursuant to a subpoena ad testificandum directed to the Custodian of Records for the Union. Ms. Mendoza generally testified to how she collected documents on behalf of the Union that were subpoenaed by the Employer. Ms. Mendoza then testified to the relationship between the Union and the International Association of Machinists and Aerospace Workers (IAMAW). Ms. Mendoza further testified that she was a staff organizer in the Union's organizing campaign at the Employer's locations. [P Exh. 5]. However, the Employer did not ask Ms. Mendoza any questions about the alleged conduct or whether she had discussed the alleged conduct with any employees at the location in question.

The Employer did not present the three Site Managers, whom I note are under Employer's control, nor did it present the two employees. In fact, the Employer did not present any testimonial evidence regarding the police reports or conversations with unit employees regarding police reports.

The Employer entered into the record subpoenas and proofs of service that it issued on the Union, Sophia Mendoza, IAMAW, Ryan Carrillo, and the Los Angeles Police Department (hereinafter LAPD).[4] The Employer also entered into the record copies of subpoenas that it

[3] The Employer's facility at issue in this case is San Fernando Valley Interventional Radiology and Imaging Center located at 16311 Ventura Blvd., Suite 120, Encino CA 91436.

[4] Upon notice that the Employer would be seeking enforcement by the Region of the outstanding subpoenas issued to IAMAW, Ryan Carrillo, and LAPD, the Regional Director, pursuant to Section 102.31(d) of the Rules and Regulations and the Guide for Hearing Officers in Representation and 10(k) Proceedings, determined that the subpoenaed documents/testimony were not necessary for a determination of the issue because the subpoenaed documents/testimony would not show whether the alleged conduct affected unit employees and because the Employer made no offer of proof as to why it believed that any such probative documents/testimony would be revealed by the subpoenas.

In an independent decision, I decided to close the hearing before the five-day period of response for the subpoenas ran because the Employer failed to present any facts or offer of proof, or introduce any evidence, that would directly

intended to file on Union employees who were involved in the organizing campaign.[5] The Employer also entered into the record a list of individuals who worked on the Union's organizing campaign that was provided by the Union pursuant to a subpoena.

The Union did not put on any testimonial or documentary evidence.

There is no evidence in the record regarding the alleged objectionable conduct or unit employee knowledge of that conduct.

Analysis

Based on the limited record evidence and the factors outlined above that the Board considers in determining whether to set aside an election, the record evidence here does not support sustaining the Employer's objection and setting aside the election.

First, I note the importance of the closeness of the election results. The Union received a majority of the votes by two votes, with one unresolved non-determinative challenged ballot. In such close elections, it is particularly important to carefully scrutinize objections. *Robert-Orr Sysco Food Services*, 338 NLRB 614, 615 (2002); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 122 (6th Cir. 1992).

Aside from the closeness of the vote, however, there is insufficient evidence in the record regarding all the other factors the Board considers to support finding that the Union's alleged conduct had a tendency to interfere with employee free choice, including the number of incidents, their severity and whether they were likely to cause fear among employees in the voting unit, the proximity of the misconduct to the date of the election, and the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in

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or inferentially support an assertion that the subpoenas would reveal any probative evidence regarding whether unit employees in the location at issue had any knowledge of the alleged conduct. See *Burns Security Services, Inc.*, 278 NLRB 565, 565-66 (1986) (holding that a subpoena was properly quashed when the subpoenaing party had presented no facts or evidence to support the assertion that the subpoenaed documents were intended to show). I concluded that the subpoenas were no more than fishing expeditions as the Employer could provide no basis for belief or knowledge that they would provide probative information. See *Sears Roebuck & Co.*, 112 NLRB 559, 559 fn. 1 (1955) (holding that the Hearing Officer did not err refusing to allow a line of inquiry to continue when the party had admitted that it had no evidence of the allegations nor knowledge of what the continued inquiry would uncover). As support for this decision, I further note that the Employer had the ability to get the same evidence, if not more complete and better evidence, from its own employees and Site Managers, the latter of whom were under the Employer's control to call to testify at any time and from which I draw an adverse inference. See *Greg Construction Co.*, 277 NLRB 1411 (1985); *International Automated Machines, Inc.*, 285 NLRB 1122 (1987); *People's Transportation Services, Inc.*, 276 NLRB 169, 223 (1985)

[5] According to Ms. Mendoza's testimony, two of these individuals, Pieter Clayton and Joe Solis, attended no more than two organizing meetings at the very beginning of the organizing campaign and had no further involvement with the organizing campaign. [Tr. 72:7-8]. The other individual, Christian Murguia, had been questioned by Ms. Mendoza for relevant documents related to the subpoena issued on the Union. However, Ms. Mendoza stated that she did not ask Mr. Murguia to check his personal email because Union employees do not use personal email for work-related matters. [Tr. 68:10-18].

the objection. *Taylor Wharton Division*, 336 NLRB at 158, citing *Avis Rent-a-Car*, 280 NLRB at 581. In fact, the Employer presented no bargaining unit employees or any other employees to testify regarding the alleged conduct or their understanding of the conduct. I note that at least three of the employees who could testify to the conduct are Site Managers, and, as stated above, are under the control of the Employer. Based on the lack of evidence, I cannot even conclude that the police reports occurred or that the police reports were false in nature. Additionally, there is no evidence to establish that any agent, employee, or representative of the Union placed any calls to the police or talked to unit employees about calls to the police, nor is there any evidence that it could be attributed to a third party whose actions were condoned or authorized by the Union. See *Catherine's, Inc.*, 316 NLRB 186 (1995).

Even assuming arguendo that the alleged false calls were made against the Employer and employees who were unsupportive of the Union and that they were sufficient to raise fear amongst employees, there is, importantly, no evidence that any unit voters were subject to the conduct nor is there any evidence of dissemination of the conduct to any unit voters. Here again, I draw an adverse inference from the Employer's failure to call its Site Managers who were, according to the Employer, subject to the alleged false police reports and could have testified about their dissemination of the conduct to unit voters.[6] Because there is no evidence that any unit voter had any knowledge of the alleged conduct, the record evidence does not support finding that the alleged conduct had a tendency to interfere with employee free choice in the vote. See *Avante at Boca Raton*, 323 NLRB at 560.

Recommendation

Accordingly, I recommend that Objection 2 be overruled in its entirety.

V. CONCLUSION

Based on the foregoing, the Employer has failed to establish that the Union's alleged conduct reasonably tended to interfere with employee free choice and, thus, has failed to meet its burden necessary to set aside the Board-supervised election. Therefore, I recommend that the Employer's Objection 2 be overruled and that a Certification of Representative be issued to the Union.

VI. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region by February 20, 2018. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

[6] *See Equinox Holdings, Inc.*, 364 NLRB No. 103, fn 1 (2016) (holding that the Hearing Officer reasonably drew an adverse inference against an employer for failing to call as witnesses the employees who allegedly observed the incident in question).

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region 31, 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business 5:00 p.m. on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: February 6, 2018

Sarah Ingebritsen, Hearing Officer
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Ste. 600
Los Angeles, CA 90064

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIONAL RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

By and through the Undersigned Counsel, RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center (the "Employer") hereby files these Exceptions to the Hearing Officer's Report and Recommendations on Objections (hereafter, the "Report") issued in the above-referenced case by Hearing Officer Sarah Ingebritsen (hereafter, the "Hearing Officer") on February 6, 2018.

Introductory Paragraph

Exception No. 1: The Employer excepts to the Hearing Officer's recommendation that the Employer's objection be overruled in its entirety and that an appropriate certification issue. See Decision p. 1.

Grounds: The Employer was not provided a full opportunity to present its case, and thus the Hearing Officer's recommendation is drawn upon an

incomplete record, in violation of the Rules and Regulations of the National Labor Relations Board (hereafter, the "Board") and Board precedent.

I. Procedural History

Exception No. 2: The Employer excepts to the Hearing Officer's finding that the ballots cast in the December 6, 2017 election were "valid ballots". See Decision p. 1.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence of voter coercion and intimidation, the Hearing Officer's finding is drawn from an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 3: The Employer objects to the Hearing Officer's finding that, at the January 23, 2018 hearing, "all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, and to argue their respective legal positions." See Decision p. 2.

Grounds: The Hearing Officer's finding is not supported by the record, and is contrary to the Board's Rules and Regulations and Board precedent.

IV. The Employer's Objections and My Recommendations

Objection 2: Objectionable Conduct

Exception No. 4: The Employer excepts to the Hearing Officer's characterization of the Employer's allegation as an objection that "the Union and / or a third party harassed the Employer or eligible voters." See Decision p. 3.

Grounds: The Hearing Officer's characterization of the Employer's allegation is not supported by the record.

Record Evidence

Exception No. 5: The Employer excepts to the Hearing Officer's finding that the Employer called Sophia Mendoza "to testify to the underlying conduct at issue in its objection." See Decision p. 4.

Grounds: The Hearing Officer's finding is not supported by the record.

Exception No. 6: The Employer excepts to the Hearing Officer's finding that "the Employer did not present any testimonial evidence regarding the police reports or conversations with unit employees regarding police reports." See Decision p. 4.

Grounds: The Hearing Officer's finding mischaracterizes the record.

Exception No. 7: The Employer excepts to the Regional Director's determination that the documents subpoenaed by the Employer from the

International Association of Machinists and Aerospace Workers (hereafter, the "IAMAW"), Ryan Carrillo, and the Los Angeles Police Department (hereafter, the "LAPD") "were not necessary for a determination of the issue because the subpoenaed documents / testimony would not show whether the alleged conduct affected unit employees and because the Employer made no offer of proof as to why it believed that any such probative documents / testimony would be revealed by the subpoenas." See Decision p. 4, FN 4.

Grounds: The Regional Director's determination is contradicted by the record, and is contrary to the Board's Rules and Regulations and the Board's precedent.

Exception No. 8: The Employer excepts to the Hearing Officer's "independent decision" to close the hearing before the five-day period of response to the subpoenas ran "because the Employer failed to present any facts or present any facts or offer of proof, or introduce any evidence, that would directly or inferentially support an assertion that the subpoena would reveal any probative evidence regarding whether unit employees in the location at issue had any knowledge of the alleged conduct." See Decision pp. 4-5, FN 4.

Grounds: The Hearing Officer's ruling and findings are contradicted by the record, and are contrary to the Board's Rules and Regulations and the Board's precedent.

Exception No. 9: The Employer excepts to the Hearing Officer's finding that "the subpoenas [issued by the Employer] were no more than fishing expeditions as the Employer could prove no basis for belief or knowledge that they would provide probative information." See Decision p. 5, FN 4.

Grounds: The Hearing Officer's finding is contradicted by the record, and is contrary to the Board's Rules and Regulations and the Board's precedent.

Exception No. 10: The Employer excepts to the Hearing Officer's finding that "the Employer had the ability to get the same evidence, if not more complete and better evidence, from its own employees and Site Managers". See Decision p. 5, FN 4.

Grounds: The Hearing Officer's finding is contradicted by the record, and is contrary to the Board's Rules and Regulations and the Board's precedent.

Exception No. 11: The Employer excepts to the Hearing Officer's finding of an adverse inferenced based upon the fact that the Employer did not call Site Managers to testify during the hearing. See Decision p. 5, FN 4.

Grounds: The Hearing Officer's finding is contradicted by the record, and is contrary to the Board's Rules and Regulations and the Board's precedent.

Exception No. 12: The Employer objects to the Hearing Officer's finding that "there is no evidence in the record regarding the alleged objectionable conduct or unit employee knowledge of that conduct." See Decision p. 5.

Grounds: The Hearing Officer's finding is not supported by the record. Furthermore, because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence of the objectionable conduct and voter knowledge of the objectionable conduct, the Hearing Officer's finding is drawn from an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Analysis

Exception No. 13: The Employer excepts to the Hearing Officer's conclusion that, "[b]ased on the limited record evidence and the factors outlined above that the Board considers in determining whether to set aside an election, the record evidence here does not support sustaining the Employer's objection and setting aside the election." See Decision p. 5.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence to support its case, the Hearing Officer's conclusion is drawn upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 14: The Employer excepts to the Hearing Officer's finding that "there is insufficient evidence in the record regarding all the other factors the Board considers to support finding that the Union's alleged conduct had a tendency to interfere with employee free choice". See Decision p. 5.

Grounds: The Hearing Officer's finding mischaracterizes the Employer's allegation and is not supported by the record. Furthermore, because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence of coercion and intimidation affecting employee free choice, the Hearing Officer's conclusion is drawn upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 15: The Employer excepts to the Hearing Officer's finding that "based on the lack of evidence, I cannot even conclude that the police reports occurred or that the police reports were false in nature." See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, the Hearing Officer's finding is based upon an

incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 16: The Employer excepts to the Hearing Officer's finding that "there is no evidence to establish that any agent, employee or representative of the Union placed any calls to the police or talked to unit employees about calls to the police, nor is there any evidence that it could be attributed to a third party whose actions were condoned or authorized by the Union." See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, the Hearing Officer's finding is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent. Furthermore, the Hearing Officer's conclusion is based upon an inference that the Union's involvement was somehow required for the misconduct to have affected employee free choice, in contradiction to both the rulings of the Regional Director for Region 31 and the Hearing Officer herself.

Exception No. 17: The Employer excepts to the Hearing Officer's finding that there is "no evidence that any unit voters were subject to the conduct". See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding voter coercion and intimidation, the Hearing Officer's finding is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 18: The Employer excepts to the Hearing Officer's finding that there is no "evidence of dissemination of the conduct to any unit voters." See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding voter knowledge regarding the coercion and intimidation, the Hearing Officer's finding is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 19: The Employer excepts to the Hearing Officer's finding of an adverse inferenced based upon the fact that the Employer did not call Site Managers to testify during the hearing. See Decision p. 6.

Grounds: The Hearing Officer's finding is contradicted by the record, and is contrary to the Board's Rules and Regulations and the Board's precedent.

Exception No. 20: The Employer excepts to the Hearing Officer's finding that "there is no evidence that any unit voter had any knowledge of the alleged conduct". See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence of voter knowledge regarding the coercion and intimidation, the Hearing Officer's finding is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 21: The Employer excepts to the Hearing Officer's finding that "the record evidence does not support finding that the alleged conduct had a tendency to interfere with employee free choice in the vote." See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, voter coercion and intimidation, and / or voter knowledge thereof, the Hearing Officer's finding is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Recommendation

Exception No. 22: The Employer excepts to the Hearing Officer's recommendation that Employer's Objection 2 "be overruled in its entirety." See Decision p. 6.

Grounds: The Hearing Officer's recommendation is not supported by the record, the Board's Rules and Regulations, and Board precedent. Furthermore, because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, voter coercion and intimidation, and / or voter knowledge thereof, the Hearing Officer's finding is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

V. Conclusion

Exception No. 23: The Employer excepts to the Hearing Officer's conclusion that the Employer "failed to establish that the Union's alleged conduct reasonably tended to interfere with employee free choice". See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, voter coercion and intimidation, and / or voter knowledge thereof, the Hearing Officer's conclusion is based upon an

incomplete record, in violation of the Board's Rules and Regulations and Board precedent. Furthermore, the Hearing Officer's inference that the Union's involvement was somehow required for the misconduct to have affected employee free choice is in contradiction to both the rulings of the Regional Director for Region 31 and the Hearing Officer herself.

Exception No. 24: The Employer excepts to the Hearing Officer's conclusion that the Employer "failed to meet its burden necessary to set aside the board-supervised election." See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, voter coercion and intimidation, and / or voter knowledge thereof, the Hearing Officer's conclusion is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 25: The Employer excepts to the Hearing Officer's recommendation that Employer's Objection No. 2 be overruled. See Decision p. 6.

Grounds: Because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence regarding the police reports, voter coercion and intimidation, and / or voter

knowledge thereof, the Hearing Officer's recommendation is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Exception No. 26: The Employer excepts to the Hearing Officer's recommendation that a Certification of Representative be issued to the Union. See Decision p. 6.

Grounds: The Hearing Officer's recommendation transgresses the authority delegated to the Hearing Officer by the Regional Director of Region 31. Furthermore, because the Employer was prevented by the Regional Director and the Hearing Officer's rulings from obtaining and presenting evidence in support of Employer Objection No. 2, the Hearing Officer's recommendation is based upon an incomplete record, in violation of the Board's Rules and Regulations and Board precedent.

Dated: Mount Pleasant, South Carolina

February 20, 2017

Respectfully Submitted,

____/s/_____
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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIONAL RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin A. Kaseta, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Employer's Exceptions to the Hearing Officer's Report and Recommendation on Objections were e-filed this date through the website of the National Labor Relations Board (www.nlrb.gov). The Undersigned does hereby further certify that a copy of the Employer's Exceptions to the Hearing Officer's Report were served this date upon the following by email:

Florice Hoffman
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Dated: Mount Pleasant, South Carolina

February 20, 2018

Respectfully Submitted,

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
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and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

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February 20, 2018

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TABLE OF AUTHORITIES

By and through the Undersigned Counsel, RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center (hereafter, the "Employer") hereby submits this Brief in Support of Exceptions to the Hearing Officer's Report and Recommendations on Objections (hereafter, the "Report") issued in the above-referenced case by Hearing Officer Sarah Ingebritsen (hereafter, the "Hearing Officer") on February 6, 2018.

Statement of the Case

The case was heard by Hearing Officer Sarah Ingebritsen in Los Angeles, California on January 29-30, 2018. GC Ex. 1(k). It arises as a result of an objection filed by the Employer to an election involving the National United Healthcare Workers Union (hereafter, the "Union") that was held on December 6, 2017.

Summary of Proceedings

The Election & The Employer's Objections

On December 6, 2018, an election was held at the Employer's facility in Encino, California, during which technical employees voted as to whether or not they wished to be represented for purposes of collective bargaining by

the Union. GC Ex. 1(c).[1] Of approximately six eligible voters, six employees cast ballots in the election, with two employees voting against representation by the Union and four employees voting for representation by the Union. GC Ex. 1(c). On December 13, 2017, the Employer filed timely objections to the conduct of the election and conduct affecting the results of the election (hereafter, the "Objections") with Region 31 (hereafter, the "Region") of the National Labor Relations Board (hereafter, the "Board"). GC Ex. 1(c).

In connection with the Employer's objections, on December 13, 2017, the Employer also filed a request for an extension of time to present the Region with evidence related to Employer Objection No. 2, in which the Employer alleged that the Union, or an agent or affiliate of the Union, had harassed and intimidated the eligible voters by filing false police reports against individuals who had opposed the Union. Tr. 8-9, Att. A. The Employer explained that Objection No. 2 required additional proof that the Employer needed to gather information from the Los Angeles Police Department (hereafter, the "LAPD"), and that the Employer would be

[1] References to the transcript shall be indicated as "Tr. ___". References to exhibits from the hearing on Employer's Objection 2 shall be indicated as "E. Ex. ___" and "GC Ex. ___". References to the Hearing Officer's Report and Recommendations on Objections shall be indicated "Decision p. ___". Attachments to the Employer's Brief in Support of Exceptions shall be indicated "Att. ___".

unable to gather such evidence by the December 13, 2017 deadline for the Employer's submission of proof in support of its objections. Tr. 37, Att. A. On December 15, 2017, the Acting Regional Director for the Region, Tom Chang, denied the Employer's request for additional time to provide evidence in support of Objection No. 2, holding that there was "insufficient good cause shown to warrant an extension of time." Att. B.

Thereafter, on January 12, 2018, the Regional Director issued a Partial Decision on Objections and Notice of Hearing (hereafter, the "Partial Decision"), overruling all of the Employer's objections to the election, except for Objection No. 2, which was set for hearing on January 29, 2018. GC Ex. 1(c). In the Partial Decision, the Regional Director noted that "the Employer […] intends to issue subpoenas to the Union in order to present further documentary evidence showing the Union's involvement with these false police reports and intends to present information it has requested from the LAPD. GC Ex. 1(c). The Regional Director noted that "the Employer presented no evidence to establish that the Union and its agents were responsible for the alleged filing of these police reports" but stated that, "the question of whether the alleged filing of police reports against individuals who refused to support and / or communicate with the Union was 'so aggravated as to create a general atmosphere of fear and reprisal rendering a

free election impossible' […] raises substantial and material issues of fact that can best be resolved on the basis of record testimony taken at hearing." GC Ex. 1(c). Therefore, the Regional Director concluded, "with respect to Objection 2, I have concluded that the evidence described in the offer of proof submitted by the Employer / Petitioner accompanying its objections could be grounds for overturning the election if introduced at a hearing." GC Ex. 1(c). Accordingly, the Regional Director ordered that a hearing be held "for the purpose of receiving evidence to resolve the issues raised by Objection 2. At the hearing, the parties will have the right to appear in person to give testimony, and to examine and cross-examine witnesses. Upon the conclusion of the hearing, the Hearing Officer shall submit to me and serve on the parties a report containing resolution of the credibility of witnesses, findings of fact, and recommendation as to the disposition of Objection 2." GC Ex. 1(c). [2]

The Hearing on Objection No. 2

Thereafter, pursuant to the Regional Director's rulings, a hearing on Employer's Objection No. 2 was convened on January 29-30, 2018. GC Exs. 1(g), 1(i), 1(k); Decision p. 2. Prior to the hearing, the Employer

[2] The Partial Decision also consolidated this case for hearing with Case No. 31-RM-209424, which involved the same Union and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center. GC Ex. 1(c).

served subpoenas on the Union, Sophia Mendoza (an employee of the Union), the International Association of Machinists and Aerospace Workers, District Lodge 725 (hereafter, the "IAMAW"), Ryan Carrillo (an employee of IAMAW),[3] and the LAPD. E. Exs. 1-4. The Employer's subpoenas sought information in relevant to Objection No. 2, including information about the identity of the filers of certain police reports that involved employees of the Employer, contact between the Union, IAMAW, Mendoza, and / or Carrillo and the LAPD during the Union's organizing campaign, and any communications between the eligible voters and the Union, the IAMAW, Mendoza, and / or Carrillo about police reports during the Union's organizing campaign. E. Exs. 1, 3, 4.

During the hearing on January 29, 2018, the Union provided the Employer with documents responsive to the subpoenas issued to the Union's Custodian of Records and Mendoza, including a list of Union employees and

[3] As Counsel for the Employer explained at the hearing, and as Mendoza's testimony would later establish, the IAMAW and Carrillo have a relationship with the Union such that the Employer asserted it was possible that either party could have acted as the Union's agent in connection with the filing of false police reports or discussions of the police reports with eligible voters. Tr. 13-14, 41, 75-78. This line of questioning by the Employer was limited by the Hearing Officer, who sustained the Union's objection to the relevance of the questions regarding the association between the two unions. Tr. 78.

volunteers who worked on the Union's organizing campaign.[4] Tr. 22, 109, 114, 118, 51-57, 90, 149; E. Ex. 5. No representatives of the IAMAW, Carrillo, or the LAPD appeared at the hearing, nor had any of the subpoenaed parties filed any petition to revoke the subpoenas that had been served upon them at the time the record was closed by the Hearing Officer. Tr. 7, 11, 12, 42. Counsel for the Employer provided multiple offers of proof on the record, illustrating that the evidence sought by the subpoenas issued to IAMAW, Carrillo, and the LAPD was not only relevant, but in fact necessary, for the Employer to proceed in its case. Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48. Specifically, the Employer argued that the evidence sought by the Employer's subpoenas would illustrate whether there was any evidence that police reports had directly impacted the employees of the Employer, either because they themselves were the subject of police reports, or because they heard something about the police reports from the Union or one of its agents. Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48. Thereafter, despite having previously acknowledged that she was without authority to rule upon the subpoenas, due to the fact that no petitions to revoke had been filed by the subpoenaed parties, the Hearing Officer

[4] The Union objected to the provision of the names of employees in response to a request for the names of any individuals who had assisted the Union with its organizing campaign, and the Union's objection was sustained by the Hearing Officer. Tr. 110-111, 57-58, 146-147.

stated that the Board's authority to enforce the Employer's subpoenas effectively gave the Region and the Hearing Officer the ability rule upon the relevance of the Employer's outstanding subpoenas. Tr. 15, 30, 44-46, 150-152. Pursuant to this logic, the Hearing Officer took the position that, because the Region would not enforce the Employer's subpoenas, the subpoenas were effectively quashed. Tr. 15, 30, 44-46, 150-152. This position was taken over the strong and repeated objection of Counsel for the Employer. Tr. 42-43, 44-46.

Next, the Employer called Nelson Beltran, a courier employed by the Employer, to testify regarding the proper service of the Employer's subpoenas, and Mendoza, to question her about her response, and the Union's response, to the subpoenas, as well as about the Union's relationship with the IAMAW. Tr. 60-79. During her testimony, Mendoza represented that she, as Custodian of the Records for the Union, had not personally undertaken a search for the documents requested by the Employer's subpoena *duces tecum*, but rather had contacted certain individuals employed by the Union, and who worked with the Union on its organizing campaign, and asked them to independently search their records for responsive documents. Tr. 67-69, 74. Mendoza testified that she did not instruct those individuals to check their personal emails or cell phones for

documents responsive to the Employer's subpoena *duces tecum*. Tr. 68. Mendoza also explained that, beyond the names of individuals who had worked on the Union's organizing campaign, there were two volunteers, named Pete Clayton and Joe Solis, who had attended one or two of the Union's organizing meetings. Tr. 71-72. Mendoza did not ask these individuals to review their records in response to the Employer's subpoena *duces tecum*. Tr. 72.

Also during the first day of hearing on January 29, 2018, Counsel for the Employer requested additional subpoenas *ad testificandum* and subpoenas *duces tecum*, in light of evidence obtained by way of the Union's and Mendoza's responses to the Employer's subpoenas, and through Mendoza's testimony. Tr. 32, 59-60, 79, 82-83, 93-95. The Hearing Officer instructed the Employer to utilize the remaining subpoenas that had been previously requested and not utilized, and the Region provided the Employer with additional subpoenas as requested. Tr. 84. On the basis of the additional subpoenas requested, as well as the outstanding subpoenas to which the parties had not responded, the Employer took the position, at the end of the first day of hearing, that the record should remain open for the receipt of additional evidence. Tr. 85. The Hearing Officer agreed, stating, "I do believe its relevant to hear the testimony of any witnesses that the

Employer may have, based on the new evidence that arose today" and scheduling the hearing to continue the next day. Tr. 86, 102.

On January 30, 2018, the parties reconvened for a second day of hearing, as scheduled. Tr. 128. Counsel for the Employer indicated that the Employer would not be presenting any evidence, unless either the LAPD or the IAMAW appeared at the hearing in response to the Employer's subpoenas. Tr. 131. Counsel for the Employer also stated that the Employer had served additional subpoenas on the LAPD, and was arranging for delivery of additional subpoenas to individuals associated with the Union's organizing campaign.[5] Tr. 131, 134; E. Exs. 6-9. The Hearing Officer requested that Counsel for the Employer make an offer of proof regarding the "basis for its belief that this new subpoena is going to provide probative evidence that the Employers and the unit knew of the conduct." Tr. 132. In response, Counsel for the Employer explained that the new subpoenas prepared by the Employer sought similar information to the subpoenas that the Employer had previously issued, but expanded upon those requests based upon new information – namely, the identities of additional individuals involved with the Union's organizing campaign – revealed by the Union's

[5] Specifically, the Employer had prepared, and was arranging to serve, subpoenas to individuals named Joe Solis, Pieter Clayton, and Cristian Murguia. E. Exs. 7-9.

subpoena responses and Mendoza's testimony on the first day of the hearing. Tr. 132-136, 137. Counsel for the Employer again explained that the subpoenas would produce responses that would bear directly upon whether the employees of the Employer were directly affected by, or had knowledge of, the police reports being filed. Tr. 132-136, 137. After returning from consultation with the Regional Director, the Hearing Officer ruled that the Region would not enforce the new subpoenas that the Employer had served on the LAPD, nor would the Hearing Officer keep the record in the case open so that the Employer could serve, and receive responses to, the rest of the subpoenas that it had drafted the previous night. Tr. 151-152, 155-156. Thereafter, the Hearing Officer closed the record. Tr. 159.

The Hearing Officer's Report

On February 6, 2018, the Hearing Officer issued her Report, recommending that the "Employer's objection [No. 2] be overruled in its entirety and that an appropriate certification issue." Decision p. 1. In her Report, the Hearing Officer erroneously claimed that, "[a]t the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, and to argue their respective legal position." Decision p. 2.

Turning to the evidence in the record, the Hearing Officer found that "the Employer did not present any testimonial evidence regarding the police reports or conversations with unit employees regarding police reports." Decision p. 4. In addressing the Employer's subpoenas to the LAPD and the IAMAW, the Hearing Officer noted that the **Regional Director** had "determined that the subpoenaed documents / testimony were not necessary for a determination of the issue because the subpoenaed documents / testimony would not show whether the alleged conduct affected unit employees, and because the Employer made no offer of proof as to why it believed any such probative documents / testimony would be revealed by the subpoenas." Decision p. 4, FN 4. Furthermore, the Hearing Officer stated that she had made an "independent decision" to close the hearing without receipt of the subpoenaed documents "because the Employer failed to present any facts or offer of proof, or introduce any evidence, that would directly or inferentially support an assertion that the subpoenas would reveal any probative evidence regarding whether unit employees in the location at issue had any knowledge of the alleged conduct." Decision pp. 4-5, FN 4. Finally, Hearing Officer concluded with her belief that the Employer could have obtained "the same evidence, if not more complete and better evidence from its own employees and Site Managers", and relied upon this finding as

the basis for drawing an adverse inference based upon the fact that those individuals were not called by the Employer. Decision p. 5, FN 4.

The Hearing Officer then concluded that "the record evidence here does not support sustaining the Employer's objections and setting aside the election." Decision p. 5. The Hearing Officer found that there was insufficient evidence of "all the factors the Board considers to support finding that the Union's alleged conduct had the tendency to interfere with employee free choice" and again noted that she was drawing an adverse inferenced based upon the fact that the Employer did not call the Site Managers named in the Employer's Offer of Proof Supporting Objection No. 2. Decision pp. 5, 6. The Hearing Officer further noted that there was "no evidence to establish that any agent, employee, or representative of the Union placed any calls to the police or talked to unit employees about calls to the police, nor is there any evidence that it could be attributed to a third party whose actions were condoned or authorized by the Union." Decision p. 6. Finally, the Hearing Officer concluded that, even if the Employer had presented evidence regarding the calls to the police and their falsity, there remained no evidence of the impact on the eligible voters of the Employer, and therefore, no evidence that the conduct at issued in Objection No. 2 had interfered with employee free choice in the election. Decision p. 6.

Accordingly, the Hearing Officer recommended that "Objection 2 be overruled and that a Certification of Representative be issued to the Union." Decision p. 6.

Issues Presented

1. Whether the Regional Director erred by refusing to enforce the Employer's subpoenas. (See Exceptions 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26)
2. Whether the Board had an obligation to investigate the Employer's claim of false police reports filed against employees of the Employer, where the filing of false police reports constitutes a crime in the state of California. (See Exceptions 1, 2, 3, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26)
3. Whether the Region's authority to seek enforcement of subpoenas issued by the Employer also imbued the Region with authority to effectively revoke the Employer's subpoenas in this case on the grounds of relevance, where no petitions to revoke had been filed. (See Exceptions 1, 2, 3, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26)
4. Whether the Hearing Officer erred by closing the record while the Employer's subpoenas were outstanding. (See Exceptions 1, 2, 3, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26)

5. Whether the Hearing Officer's findings were supported by the record. (See Exceptions 4, 5, 7, 8, 9, 10, 11, 12, 14, 19, 22)
6. Whether the Hearing Officer erred by finding an adverse inference on the basis of the Employer's decision not to call the Site Managers named in the Employer's Offer of Proof which accompanied Employer's Objection No. 2. (See Exceptions 10, 11, 19)
7. Whether the Hearing Officer transgressed her authority by recommending that a Certification of Representative be issued to the Union. (See Exception 26)

Summary of Argument

The rulings made by the Regional Director and the Hearing Officer concerning the Employer's subpoenas and the closure of the record in this case prevented the Employer from presenting significant evidence regarding both the Union's involvement in the filing of police reports concerning the Employer or the Employer's employees, and the impact of the police reports, whether they directly involved the Employer's employees or not, on the Employer's employees. First, the Regional Director transgressed her authority and erred by denying enforcement of the Employer's subpoenas, even though the record clearly illustrated that the information sought by the subpoenas was material to the Employer's case, and the subpoenas were not

contrary to any law or the Act. Furthermore, the Regional and the Hearing Officer erred by not recognizing the Board's obligation to pursue the evidence of unlawful conduct sought by the Employer's subpoenas, even if the violation was not a violation of the National Labor Relations Act.

The Regional Director further erred and abused the Region's authority by construing the General Counsel of the Board's power to deny enforcement of the Employer's subpoenas as authority on the part of the Region to rule *sua sponte* upon the relevance and timeliness of the Employer's subpoenas, as though those issues had been before the Regional Director *via* petitions to revoke. The Region was not imbued with the authority to make determinations about the relevance or timeliness of the Employer's subpoenas, where neither the IAMAW or the LAPD had raised such issues in a petition to revoke. And yet, the Regional Director and Hearing Officer's rulings, as articulated by the Hearing Officer during the hearing and in the Hearing Officer's Report, clearly rely upon these grounds to deny enforcement on behalf of the General Counsel, which the Region apparently feels is a process that can improperly stand in the stead of properly-filed petition to revoke. Similarly, the Hearing Officer relied upon the Regional Director's denial of enforcement and her misguided findings

regarding relevance and timeliness as grounds to close the record, contrary to the Board's rules and precedent.

Finally, because the record in this case was incomplete, certain of the Hearing Officer's findings and recommendations are not supported by a full and fair record, and were thus contrary to the Board's rules and precedent. In particular, the Hearing Officer erred by finding an adverse inference based upon the fact that the Employer did not call its Site Managers to testify, where the record illustrated clearly that no such adverse inference was warranted. Second, the Hearing Officer's conclusions concerning whether sufficient evidence supported Employer's Objection No. 2 must be rejected, as they were based upon an incomplete record. Finally, the Hearing Officer's recommendation that a Certification be issued to the Union must be ignored, as the Hearing Officer does not possess the authority to offer recommendations or findings related to the Employer's objections as a whole, but instead possessed limited authority over Objection No. 2.

Argument

The Premature Closure of the Record

The premature closure of the record in this case was accomplished by way of a series of actions undertaken by the Region and / or Regional Director and the Hearing Officer over the course of the two-day hearing, in

violation of the Board's Rules and Regulations, as well as long-standing Board precedent.

Denial of Enforcement of Subpoenas

First, the Regional Director's decision to deny enforcement of the Employer's subpoenas was erroneous. Pursuant to the Board's Rules and Regulations, any party to a case has the right to request, and have issued to them by the Board, "subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, in their possession or under their control. NLRB Rules & Regulations, §§102.66(f); 102.69(c)(1)(3). A party served with a subpoena has five days within which to petition in writing to revoke the subpoena. Id. A petition to revoke should be granted only when "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." Id. If a party fails to comply with a subpoena, the General Counsel of the Board "**will** […] institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with the law and with

the policies of the [National Labor Relations] Act." NLRB Rules & Regulations §102.31(d) (emphasis added).

In the case at bar, the Board's standard for refusing to enforce a private party's subpoena was not applied, and was not met. First and foremost, the Board's Rules and Regulations illustrate that the authority to enforce subpoenas rests with the Board's General Counsel. In the case at bar, the Hearing Officer's Report asserts that the decision on whether to enforce the subpoenas was made by the Regional Director. However, the Hearing Officer never articulated that the General Counsel had been presented with the Employer's request for enforcement of the Employer's subpoenas, nor did the Hearing Officer ever state that the General Counsel had been involved in what was apparently considered to be the Regional Director's decision not to enforce the Employer's subpoenas. For this reason alone, the Regional Director's ruling is invalid, and must be reversed.

Additionally, at various points in time throughout the hearing, the Hearing Officer and the Regional Director (whose rulings were expressed by the Hearing Officer) appeared to rely upon relevancy and timeliness as the grounds upon which the Regional Director refused to enforce the Employer's subpoenas. First the Hearing Officer told the Employer that the IAMAW and Carrillo subpoenas would not be enforced because they were

not relevant, relying upon the Regional Director's Partial Decision overruling an objection that had claimed an affiliation between the Union and the IAMAW. Tr. 44. Not only is relevance not a basis for denial of enforcement, as set forth by the Board's Rules and Regulations, but as Counsel for the Employer explained at the hearing, the question of the relevance of the information sought by the Employer did not rise or fall upon the Regional Director's ruling regarding the association between the Union and the IAMAW, as an agency relationship could exist regardless of whether the two unions had formed a formal affiliation. See Tr. 44-45.

Next, the Hearing Officer stated that the documents requested by the Employer from the LAPD and the IAMAW "do not actually show any impact or knowledge – direct knowledge of the employees at the location at issue." Tr. 44. Similarly, the Hearing Officer stated, "I do not see how these documents requested in this subpoena duces tecum could show effect on the employees in question." Tr. 50. The Hearing Officer's assertions were unfounded in light of the record, which included multiple offers of proof from the Employer regarding the relevance of the documents sought. See Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48, 134. Specifically, as Counsel for the Employer had explained, the documents subpoenaed from the LADP and the IAMAW would have shown whether there was a direct

impact on the employees of the Employer, as the requests would have captured any police reports filed by the Union or IAMAW against an employee of the Employer, as well as any direct communication between either union, or any known agent of either union, and the employees of the Employer. Thus, relevance was clearly established, and in fact this relevance was recognized by the Union, who did not petition to revoke the Employer's substantially similar subpoenas issued to the Union and Mendoza, but rather complied with the Employer's subpoenas and provided the Employer with responsive documents. Furthermore, the question of relevance is not part of the standard for enforcement, which requires only that the subpoenas themselves not be contrary to the law or the Act.

Next, the Hearing Officer remarked that, "the relevancy of this information, in specific regards to the objection at issue, has not been established, particularly because there has been no showing that the conduct of these employees, or any conduct in general, has rendered a fair and free election impossible." Tr. 46. As Counsel for the Employer noted, the Hearing Officer's logic was circular in nature, inasmuch as determining whether the record would support the relevance of the subpoenas required the subpoenaed evidence to already be in the record. See Tr. 46. The logical flaw in the Hearing Officer's position is laid bare by the Hearing

Officer's own statement, later in the record that: "I can't make a statement as to the relevancy of testimony I haven't heard yet. […]" Tr. 80-81. Despite having recognized this immutable fact, the Hearing Officer did just that when she cited the lack of record evidence as grounds upon which the Employer's subpoenas should not be enforced, and grounds upon which to prevent the inclusion of relevant evidence in the record.

Again, not only was the Board's enforcement standard badly misapplied, but furthermore, the Hearing Officer's logic assumed that employees who have been coerced or intimidated in connection with the police reports would respond to subpoenas and testify truthfully, in circumstances where employees have already expressed concerns about intimidation and retaliation. As Counsel for the Employer explained on the record, "I could issue subpoenas to all those employees, but if they've been threatened or feel intimidated, I want to also review the related documentation, because I think that would prove whether or not that is the case, especially where I know there are employees who have already expressed that they are literally too scared to share their true feelings at their work sites." Tr. 91. See Also Tr. 134. Alternatively, the Employer's subpoenas would conclusively establish the same facts, rendering not only relevant evidence, but in fact the best evidence, of what police reports were

filed, and the effect or impact of those police reports on the employees of the Employer. Furthermore, the Employer's approach would prevent the further intimidation of already-ostracized and coerced employees, with not corresponding issues with the credibility of the Employer's evidence.

Finally, in addition to the Hearing Officer's claims regarding relevance as it related to the Regional Director's decision not to enforce the Employer's subpoenas, the Hearing Officer also advanced the theory that the Employer's subpoenas were not timely, stating during the hearing that, "the Employer was in receipt of these subpoenas and could have issued them well beforehand to allow the prompt presentation of evidence." Tr. 156. This statement indicates that the Hearing Officer and the Region also took into consideration whether they believed that the Employer's subpoenas were timely – a question that was not before them in connection with the enforcement of the subpoenas, and that was certainly not a part of the analysis for whether or not enforcement should be granted. Here too, even if consideration of this factor had been appropriate, the Hearing Officer's analysis is undercut by the record, which illustrates that the Employer had been attempting to obtain documents from the LAPD since before it had filed its Objections, and additionally had sought additional time from the

Region in order to obtain those documents before the hearing. See GC Ex. 1(c); Atts. A-B.

Accordingly, not only is it clear that the Regional Director and Hearing Officer's arguments regarding relevance and timeliness were unfounded in light of the record, but more importantly, the Regional Director improperly applied an incorrect standard when she denied enforcement of the Employer's subpoenas. As is clearly stated by the Board's own Rules and Regulations, the **General Counsel's** should only decline to enforce subpoenas when the subpoenas sought are inconsistent with the law, or with the policies of the Act. These criteria were not considered or evaluated by the Region or the Hearing Officer – never mind the General Counsel - and these criteria are not violated by the Employer's subpoenas. Furthermore, the Hearing Officer's citations to relevance and timeliness are clearly unfounded based upon the record, but more importantly, are not proper grounds upon which enforcement should be denied. For all these reasons, the Employer's subpoenas should have been enforced by the General Counsel, as is required by the Board's Rules and Regulations, and because the Employer's subpoenas were not enforced, the Employer's case, and the presentation of much of its evidence, were prejudiced by the Regional Director and the Hearing Officer.

The Board's Obligation to Investigate Violations of Other Laws

Additionally, the Employer's subpoenas should have been enforced pursuant to the Board's obligation to investigate and take evidence as necessary of even those violations of the law that implicate a statute or regulation other than the National Labor Relations Act. In the case at bar, the filing of false police reports can constitute a crime in the state of California. See Cal. Penal Code §148.5. The Employer's subpoenas explicitly sought information about police reports called in by the Union or its agents to further its organizing campaign. See Exs. 1, 3-4, 6-9. Accordingly, given the Employer's offer of proof that evidence relevant to the potential commission of such a crime as the filing of false police reports could be uncovered by the Employer's subpoenas, the Employer's subpoenas should have been enforced, and the record in the case should not have closed without the Board fulfilling its investigatory obligations. This is particularly true where Counsel for the Employer repeatedly invoked the Board's duty to investigate the commission of these crimes, and was routinely ignored by the Hearing Officer. See Tr. 34-35, 133. Because the Hearing Officer and Regional Director eschewed their responsibility in this manner, the victims of these potential crimes were denied due process, and the Employer's case was further prejudiced.

Enforcement of Subpoenas vs. Revocation of Subpoenas

The Hearing Officer additionally erred by treating the Employer's requests for enforcement of their subpoenas as a springboard off of which the Hearing Officer could effectively quash the Employer's subpoenas and preemptively close the hearing. As stated above, the Board's Rules and Regulations very clearly set forth the distinct procedures for revocation of a subpoena and enforcement of a subpoena by the General Counsel. Specifically, only a party served can petition in writing to revoke the subpoena. NLRB Rules & Regulations §§102.66(f); 102.69(c)(1)(3). Furthermore, a petition to revoke should be granted only when "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." Id. By contrast, if a party fails to comply with a subpoena, the General Counsel of the Board "**will** […] institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with the law and with the policies of the Act." NLRB Rules & Regulations §102.31(d) (emphasis added).

As soon as the Hearing Officer intimated that she and the Region intended to utilize the Employer's request for enforcement as grounds to, in essence, rule upon a petitions to revoke that had not been filed, Counsel for the Employer objected, stating, "I will be requesting enforcement of the subpoenas by the Board, but I'll state for the record that I don't think that gives the Board the right to decide that they won't wait for potentially relevant evidence to come into this record, and it gives them the right to – somehow gives them the right to close the record in this proceeding where the subpoenas are outstanding." Tr. 42-43. Counsel for the Employer went on to state, "What I do not want is for the Region to rely upon my request for enforcement as some kind of grounds for the Region to rule upon the relevance of these subpoenas, thereby closing the record in this hearing. […] The right to get enforcement of the subpoena is not concurrent with the right to rule on evidence, and declining enforcement doesn't mean you can close this hearing without the documents." Id. See Also Tr. 79-80

Over Counsel for the Employer's objections, the Hearing Officer, despite having previously acknowledged that the Region was without authority to rule on the relevance of the subpoenas where no petitions to revoke had been filed, later changed course, stating, "[The outstanding subpoenas] have been ruled on. […] They will not be enforced in this

proceeding. You can appeal that to the Regional Director in your decision, but you are not getting documents regarding those subpoenas in this hearing." Tr. 100. This position, taken by the Hearing Officer on behalf of the Region, illustrates the Region's very clear position that the General Counsel's control over enforcement of the subpoenas somehow gave the Region and / or the Hearing Officer the unilateral right to revoke the subpoenas and prevent the Employer from receiving into evidence any information from those subpoenas. As Counsel for the Employer recognized during the hearing, "if you are telling me I will never get documents for these subpoenas, you are effectively revoking them. […] [M]y client's already been prejudiced by your position on the set that's already out there." Tr. 100-101.

Furthermore, even if the Hearing Officer did have the authority to utilize the enforcement proceedings as grounds upon which to revoke the subpoenas and close the record, her reliance upon relevance and timeliness are not proper grounds upon which to revoke subpoenas. As stated by the Board's Rules and Regulations, a petition to revoke should be granted only when the evidence sought does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe the evidence sought with sufficient particularity. Neither of these circumstances

is present in this case, and neither of these reasons were relied upon by the Hearing Officer in her Report. Instead, both the Regional Director and the Hearing Officer focused upon relevance, and to a lesser extent, timeliness. Because their findings are not supported by the record or by the Board's Rules and Regulations, the *de facto* revocation of the Employer's subpoenas should not stand.

In conclusion, because the Hearing Officer and the Regional Director erred when they treated the denial of enforcement of the Employer's subpoenas as a back-door ruling on a petition to revoke for timeliness and relevance, the hearing should be re-opened, the rulings on enforcement should be struck, and the Employer be presented the full and fair opportunity to present its case, including by subpoenaing witnesses and documents, of which it was previously deprived.

Closure of the Record

Finally, the Hearing Officer erred when she reached her "independent decision" to close the record, despite the existence of both the Employer's outstanding and yet-to-be-issued subpoenas. The Board's rules make clear that, "it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under

Section 9(c) of the Act." NLRB Rules and Regulations §102.64(b); See Also NLRB Representation Manual §11188.1. Furthermore, the Board's Rules state that, "Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections […] that are the subject of the hearing." NLRB Rules and Regulations §102.66(c)(1)(iii). The Board's case law also supports the development of a full record,

The Hearing Officer's Report and the record both ably illustrate that the Hearing Officer did not proceed in accordance with the Board's Rules and precedent when she closed the record in the instant case. Far from being granted an opportunity to present its case, the Employer was badgered for multiple offers of proof regarding the evidence sought by its subpoenas, but was ultimately foreclosed from presenting any of the evidence it sought by way of its subpoenas issued to the LAPD, the IAMAW, Carrillo, Solis, Clayton, and Murguia. Additionally, in the Hearing Officer's Report, she alleged that the Employer had failed to present an offer of proof that "would support an assertion that the subpoenas would reveal probative evidence" as part of the basis for her premature closure of the record. See Decision pp. 4-

5, FN 4. To the contrary, the Employer did provide an offer of proof regarding the compelling reasons why it believed that there was a strong possibility that the information would show a direct effect the employees of the Employer. Specifically, as Counsel for Employer explained at the hearing, the number of police reports filed at other locations, the fact that the police reports were filed only at locations undergoing Union organizing, and the fact that the police reports began when the Union's organizing campaign, all contributed to the likelihood that there was a connection between the Union's organizing campaign and the police reports that were being filed, and that the evidence sought by the Employer's subpoenas would establish the impact of this involvement on the Employer's employees.

Additionally, the Hearing Officer's decision to close the record appears to have been arbitrary, in light of Hering Officer's own statements on the record. Throughout the first day of hearing, the Employer took the position that the record needed to remain open in the case, so that the Employer could receive the documents and question the witnesses sought by its subpoenas. See Tr. 79-80, 85. At the close of the first day of hearing, the Hearing Officer stated in response, "**I do believe its relevant to hear the testimony of any witnesses that the Employer may have, based on the new evidence that arose today**", and thereafter decided to keep the record

open for a second day of hearing. Tr. 86. This position suggests that the Hearing Officer recognized the potential value and the relevance of the Employer's outstanding subpoenas, as well as of the new subpoenas that the Employer had indicated, with particularity, that it intended to prepare that night. However, the Hearing Officer performed an abrupt about-face the next morning, stating categorically that the Region was denying enforcement of the subpoenas, and that she was refusing to keep the record open to receive any of the Employer's subpoenaed evidence.

Because the Hearing Officer prematurely closed the record, in violation of the Board's Rules, the Board's precedent, and her own better judgment, the record in this case should be re-opened. The premature closure of the record in this case very clearly prejudiced the Employer, inasmuch as the Hearing Officer relied heavily on the lack of record evidence – which would have come into existence in response to the Employer's subpoenas – as the basis upon which she recommended that Employer's Objection No. 2 be overruled. For all these reasons, the Employer should be presented with a full and fair opportunity to present its case regarding Objection No. 2, as is required by the Board's own Rules and Regulations.

The Hearing Officer's Findings

The Unfounded Finding of an Adverse Inference

Finally, the Hearing Officer's finding of an adverse inference against the Employer, due to the fact that the Employer had not called the Site Managers named in the Offer of Proof that accompanied the Employer's Objection No. 2, was similarly erroneous. While the Hearing Officer was entitled to make findings of fact, the drawing of an adverse inference was not warranted, based upon the record. In the case at bar, the Hearing Officer had repeatedly asked Counsel for the Employer why the Employer was not calling the Site Managers named in the Employer's Offer of Proof, which was filed contemporaneously with the Employer's Objections. Tr. 37, 47. Counsel for the Employer responded by explaining that the "Regional Director made the determination that the relevant matter wasn't going to be the fact that the police reports were filed, which is what the witnesses we named in our Offer of Proof could testify about. They could testify about their own opinions about union representation, and they could testify about the police reports that were filed. That evidence wouldn't go directly to the question of, were employees at San Fernando Interventional and San Fernando Advanced going to be influenced by the occurrences of this activity?" Tr. 36-37. See Also, Tr. 47 ("I could call them to testify, but as

I understand the Regional Director's ruling, her interest is in the effect. So I could call a Site Mangaer to testify […] but they are not able to establish – their testimony would not establish the impact on employees of San Fernando Interventional and San Fernando Advanced."); Tr. 92-93.

The Hearing Officer repeatedly conceded that, "the big issue for hearing is the impact on those employees, and whether there was an effect on employees who were voting at the two locations at issue" and that "the most important thing is that […] knowledge of the conduct was disseminated to the employees in those two locations." Tr. 49-50. In response, Counsel for the Employer responded with the Employer's position that there was "no point" in calling the Site Managers, where their testimony would not establish the dissemination with which the Regional Director and the Hearing Officer were interested. Tr. 50. The Hearing Officer did not dispute the Employer's analysis, but rather agreed with Counsel for the Employer that the issue for hearing was "the effect on the employees at issue." Tr. 50. Furthermore, when Counsel for the Employer put the question of the relevance of the Site Manager's testimony directly to the Hearing Officer, the Hearing Officer responded, "the most important evidence is the dissemination […] that employees at the two locations at issue knew of this conduct before the voting period. That is the critical

evidence we are looking for." Tr. 80-81. On this specific basis, the Employer stated, "Understanding that position you set forth […] and reading that in the context of the Regional Director's decision on the objection, I don't believe I'm going to call other witnesses." Tr. 80-81.

Based upon this review of the record, it is clear that the Hearing Officer's drawing of an adverse inference based upon the Employer's decision not to call the Site Managers was unfounded. The Employer explained clearly that the Site Managers would not be able to provide testimony relevant to the specific question that the Regional Director had set for hearing, and that the Hearing Officer had confirmed was the primary inquiry. This fact does not require the finding of a prejudicial adverse inference against the Employer, and should be reversed by the Regional Director.

The Hearing Officer's Conclusions and Recommendations

Finally, the Hearing Officer's conclusions and recommendations should be rejected, as they are based upon an incomplete record, and in at least one notable manner, transgress the boundaries of the authority bestowed upon the Hearing Officer by the Regional Director's Partial Decision. First, the Hearing Officer's conclusions finding that there was no evidence in the record to support sustaining Employer's Objection No. 2 are

based upon a thoroughly incomplete record, as explained above. Had the Regional Director and the Hearing Officer permitted the Employer to obtain and present evidence responsive to the Employer's subpoenas, a very different record would have been established. Thus, because the Hearing Officer's findings rest upon an undeveloped record, they must be rejected. Furthermore, the Hearing Officer's recommendation that a Certification should be issued to the Union must be rejected as outside the boundaries of the Hearing Officer's authority. In the Partial Decision, the Regional Director empowered the Hearing Officer to oversee the hearing, make credibility determinations and findings of fact, and to issue recommendations **only as to the disposition of Objection No. 2.** See GC Ex. 1(c). Therefore, the Hearing Officer's recommendation that the Union be issued a Certification of Representative, which rests upon a finding that the rest of the Employer's Objections should not be revisited or sustained. This recommendation is outside the confines of the authority delegated to the Hearing Officer, and must therefore be rejected.

Conclusion

For all the reason expressed herein, the Employer respectfully requests that the Region reject the findings and recommendations of the Hearing Officer's Report, and re-open the record in the underlying case on

Employer's Objection No. 2, so that the Employer's subpoenas can be enforced, and a full and fair record can be established.

Dated: Mount Pleasant, South Carolina
February 20, 2017

Respectfully Submitted,

____/s/_____
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ATTACHMENT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC D/B/A SAN FERNANDO VALLEY INTERVENTIONAL RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

EMPLOYER'S MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL OFFER OF PROOF ACCOMPANYING OBJECTIONS TO THE DECEMBER 6, 2017 ELECTION

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (hereafter, the "Board"), as amended, RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center (hereafter, "SFI" or the "Employer") hereby submits the below Motion for Extension of Time to file a supplemental Offer of Proof relative to the Employer's Objections to the election held in the above-captioned matter in Encino, California on December 6, 2017 in a unit consisting of assorted technical classifications (hereafter, the "Technical Unit"). Specifically, the Employer requests an extension of time to supplement its Offer of Proof in connection with Objection Number Two, which alleges that the Union's and / or IAMAW's conduct during the organizing campaign, specifically, upon information and belief, the Union's and / or IAMAW's

harassment of the Employer and eligible voters, by its involvement in the filing of false police reports against facilities operated by RadNet Management, Inc. and against employees of RadNet Management, Inc. who were also involved in the Union's organizing campaign, was sufficiently egregious so as to require the setting aside of the election results, and the conduct of a new election in the Technical Unit.

Though the facts detailed in the Employer's Offer of Proof are, standing alone, sufficient to warrant a hearing related to Employer's Objection Number Two, the Employer requests an extension of time to continue its investigation into the suspect circumstances under which a multitude of false police reports, as detailed by the Employer's Offer of Proof, were filed. The Employer intends to then supplement its Offer of Proof with those additional facts that further corroborate the evidence included in the Offer of Proof of the Union's involvement in the filing of the false police reports against the Employer's employees and facilities. In furtherance of these objectives, the Employer has already contacted the LAPD, and the LAPD is cooperating with the Employer's investigation into the dubious circumstances under which the aforementioned false police reports were filed.

Despite the fact that the Employer has been advised that even simply collecting police reports from LAPD in connection with all the events described in the Employer's Offer of Proof could take up to one month, the Employer has reason to believe, based upon the LAPD's level of cooperation thus far, that the Employer

will be in a position to supplement its Offer of Proof, as contemplated by this Motion, in the next two weeks. Accordingly, the Employer requests that it be permitted to file a Supplemental Offer of Proof in connection with Employer's Objection Number Two in the above-referenced case on or before December 27, 2017.

Dated: Mount Pleasant, South Carolina
December 13, 2017

Respectfully Submitted,

_____

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC D/B/A SAN FERNANDO VALLEY INTERVENTIONAL RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin A. Kaseta, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Employer's Motion for Extension of Time to File Supplemental Offer of Proof Accompanying Objections to the December 6, 2017 Election was e-filed this date through the website of the National Labor Relations Board (www.nlrb.gov). The Undersigned does hereby further certify that a copy of the Employer's Motion for Extension of Time to File Supplemental Offer of Proof Accompanying Objections to the December 6, 2017 Election was served this date upon the following by email:

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Law Office of Florice Hoffman, L.C.
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fhoffman@socal.rr.com

Ryan Carrillo
IAMAW Local District Lodge 725
5402 Bolsa Avenue
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Dated: Mount Pleasant, South Carolina
December 13, 2017

Respectfully Submitted,

_____

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ATTACHMENT B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 31
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December 15, 2017

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Re: RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center
Case 31-RM-209388

Served Via E-mail and Regular Mail

Dear Mr. Carmody and Ms. Kaseta:

The Region is in receipt of the Employer's Motion for Extension of Time to File Supplemental Offer of Proof Accompanying Objections to the December 6, 2017 election in connection with the above-caption matter.

After careful review and consideration of your motion, I am denying your request because there is insufficient good cause shown to warrant an extension of time for the Employer to file a supplemental offer of proof. In this regard, I note that your offer of proof in support of your objections relates to experiences of individuals and/or employees at the Employer's other facilities and involving different bargaining units, not of the bargaining unit employees at the Employer's facility involved in the instant case. I further note that your offer of proof does not allege that this same misconduct was directed towards any bargaining unit employees involved in the instant case.

Very truly yours,

Brian Gee
Acting Regional Director

Cc: Florice Hoffman, Attorney
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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIONAL RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin A. Kaseta, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Employer's Brief in Support of Exceptions to the Hearing Officer's Report and Recommendation on Objections were e-filed this date through the website of the National Labor Relations Board (www.nlrb.gov). The Undersigned does hereby further certify that a copy of the Employer's Brief in Support of Exceptions to the Hearing Officer's Report were served this date upon the following by email:

Florice Hoffman
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Dated: Mount Pleasant, South Carolina
February 20, 2018

Respectfully Submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC. D/B/A
SAN FERNANDO VALLEY INTERVENTIONAL
RADIOLOGY AND IMAGING CENTER

Employer/Petitioner

and **Case 31-RM-209388**

NATIONAL UNION OF HEALTHCARE
WORKERS (NUHW)

Union

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement between RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center (the Employer) and National Union of Healthcare Workers (NUHW) (the Union), an election was conducted on Wednesday, December 6, 2017 in the following voting unit:[1]

> Included: All full-time, regular part-time, and per diem Technical employees employed by the Employer at its facility at San Fernando Valley Interventional Radiology and Imaging Center located at 16311 Ventura Blvd., Suite 120, Encino, CA 91436;
>
> Excluded: All other employees, managers, confidential employees, physicians, service employees, office clericals, and guards and supervisors as defined by the Act, as amended.

The revised tally of ballots showed that of the approximately six eligible voters, four cast ballots for the Union, and two cast ballots against representation. There was one non-determinative challenged ballot and no void ballots. Therefore, the Union received a majority of the votes.

The Employer timely filed eight objections. On January 12, 2018,[2] I issued a Partial Decision on Objections and Notice of Hearing overruling all but one – Objection 2 – of the Employer's objections and ordering that a hearing be conducted to give the Employer an opportunity to present evidence regarding Objection 2. On January 12, I issued an Order Consolidating Hearings on Objections and Notice of Hearing, consolidating the captioned case

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[1] The parties also executed Stipulated Election Agreements with respect to several other separate bargaining units at other facilities of the Employer.

[2] All dates herein are 2018, unless otherwise noted.

and Case 31-RM-209424 for the purposes of conducting a hearing on objections, ruling and decision by a duly assigned Hearing Officer.

On February 6, the Hearing Officer issued a report in which she recommended overruling the Employer's Objection 2 in its entirety. The Employer filed timely exceptions to the Hearing Officer's recommendations. The Union did not file a reply brief to the Employer's exceptions.

I have carefully reviewed the Hearing Officer's rulings made at the hearing and find that they are free from prejudicial error. Accordingly, the rulings are hereby affirmed. I have further reviewed and considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that the Employer's Objection 2 should be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTION

In its Objection 2, the Employer alleged that during the critical period, the Union and/or a third party harassed the Employer and eligible voters who had voiced opposition to the Union by filing false police reports against facilities operated by the Employer and against eligible voters and that this conduct was sufficiently egregious as to require the setting aside of the election and a new election. In support of its objection, the Employer indicated in its offer of proof that it would call three Site Managers and two employees who worked at other facilities to testify about the alleged false police reports.

For the reasons set forth in the Hearing Officer's report, and as detailed below, I agree with her recommendation to overrule this objection.

II. THE EMPLOYER'S EXCEPTIONS

The Employer's 26 exceptions to the Hearing Officer's report and recommendations raise seven issues, as outlined by the Employer's brief in support of its exceptions:

1) Whether the Regional Director erred by refusing to enforce the Employer's subpoenas;
2) Whether the Board had an obligation to investigate the Employer's claim of false police reports filed against employees of the Employer, where the filing of false police reports constitutes a crime in the state of California;
3) Whether the Region's authority to seek enforcement of subpoenas issued by the Employer also imbued the Region with authority to effectively revoke the Employer's subpoenas in this case on the grounds of relevance, where no petitions to revoke had been filed;
4) Whether the Hearing Officer erred by closing the record while the Employer's subpoenas were outstanding;
5) Whether the Hearing Officer's findings were supported by the record;
6) Whether the Hearing Officer erred by finding an adverse inference on the basis of the Employer's decision not to call the Site Managers named in the Employer's Offer of Proof which accompanied Employer's Objection No. 2; and

7) Whether the Hearing Officer transgressed her authority by recommending that a Certification of Representative be issued to the Union.

These seven issues are addressed in the four general areas in the analysis section below.

III. ANALYSIS

A. The Record Does Not Support Sustaining Objection No. 2

i. The Board's Standard

It is well settled that the Board will not lightly set aside a representation election and that the burden of proof on a party seeking to have a Board-supervised, secret-ballot election set aside is a heavy one. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000); *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test, the issue is not whether a party's conduct in fact coerced employees but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984); see also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Under the standard for third-party objectionable conduct, the Board will set an election aside if the objecting party establishes that the alleged conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In applying this standard, the Board evaluates not only the nature of the alleged misconduct and the number of employees involved but also, among other things, whether the misconduct was disseminated to unit employees and the proximity of

the misconduct to the election. *Id.* (in assessing threats made by employees, who were not union agents, the Board noted that it "evaluates not only the nature of the threat itself, but also ... whether reports of the threat were disseminated widely within the unit ... and whether the threat was 'rejuvenated' at or near the time of the election.").

ii. The Limited Evidence Presented by the Employer at the Hearing

The Employer presented only two witnesses to testify. One witness testified about the service of the subpoenas issued by the Employer. The other witness, Union Representative Sophia Mendoza, appeared pursuant to an individual subpoena *ad testificandum* and pursuant to subpoenas directed to the Custodian of Records for the Union. Ms. Mendoza was one of the Union representatives who served as a staff organizer in the Union's organizing campaigns at the Employer's locations. Ms. Mendoza generally testified about how she collected documents on behalf of the Union that were subpoenaed by the Employer. Ms. Mendoza also answered questions by the Employer about the relationship between the Union and the International Association of Machinists and Aerospace Workers (IAMAW). Interestingly, the Employer did not ask Ms. Mendoza any questions about the alleged false police reports or whether she had discussed the alleged false police reports with any employees in the unit at issue in this case. Thus, the Employer presented no testimony at all about the alleged false police reports or the dissemination of information about the alleged false police reports to employees in the unit at issue here. Nor did the Employer submit into the record any documents to establish the underlying conduct alleged as objectionable.

In its brief in support of the exceptions, the Employer attempts to justify its limited presentation of evidence by pointing out that the Hearing Officer emphasized on several occasions the importance of evidence showing dissemination of the alleged false police reports among unit employees. However, contrary to the Employer's argument, although the Hearing Officer emphasized that evidence regarding dissemination and knowledge by unit employees of the alleged false police reports was a critical factor in the analysis, the Hearing Officer did not exclude or even state that other evidence related to the alleged false police reports was not relevant. Thus, it was the Employer's decision, not based on any instructions or rulings by the Hearing Officer, not to present any evidence at all regarding the alleged false police reports. Notably, in this regard, the Employer chose not to present its Site Managers or to subpoena any employees, including the six employees in the unit at issue who were in the best position to testify about their knowledge of the alleged false police reports and whether they created a general atmosphere of fear and reprisal. At a minimum, the testimony of the Site Managers and two of the employees who were allegedly subjected to the false police reports,[3] as referenced in the Employer's offer of proof in support of the objection referenced in the record, could have provided details relevant to the analysis, including the number of incidents of alleged false police reports, the severity of the incidents, and the proximity of the alleged false police reports to the election. Moreover, the Employer has failed to offer any evidence in support of its speculation that employees would not testify truthfully or not appear to testify. Thus, this assertion is

[3] According to the Employer's offer of proof, these two employees worked at other facilities; thus, they were not employees in the bargaining unit at issue in this case.

unfounded. In this regard, I note that the Employer failed to introduce any evidence of any attempt to secure the testimony of these employees, such as by introducing subpoenas to these employees in the record.

iii. Applying the Board's Standards to the Evidence

Applying the Board's standards outlined above, the record evidence fails to support the Employer's objection. In her analysis, while the Hearing Officer appropriately drew an adverse inference based on the Employer's refusal to call its Site Managers, it is unnecessary to pass on this issue. In this regard, even without the adverse inference, the limited evidence presented does not support sustaining the objection. This is so because under either the standard applied to party misconduct[4] or the standard applied to third-party misconduct, other than record evidence regarding the closeness of the election, the Employer wholly failed to present any other relevant evidence, including evidence regarding: the number of incidents, the severity/details of the incidents, the number of employees in the voting unit who were subjected to the misconduct, the degree to which the misconduct persists in the minds of the employees in the voting unit, and proximity of the alleged false police reports to the election. Significantly, the Employer further failed to present evidence showing dissemination of information about the alleged false police reports among unit employees or that employees in the bargaining unit at issue otherwise had any knowledge of the alleged false police reports. Thus, the Employer's objection cannot be sustained based on the record evidence because the Employer failed to present evidence showing that there were false police reports or that the alleged false police reports affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling the employer's objection where there was no evidence that unit employees knew of the alleged misconduct).

Accordingly, under either standard outlined above regarding alleged objectionable conduct, the evidence presented does not support sustaining Objection No. 2, and I adopt the Hearing Officer's recommendation to overrule the objection.

B. Refusal to Seek Subpoena Enforcement and Decision to Close the Record

i. The Employer's Subpoenas

At the hearing, the Employer entered into the record the subpoenas *ad testificandum* and *duces tecum* that it served on the Union, Union Representative Sophia Mendoza, International Association of Machinists and Aerospace Workers (IAMAW), Union volunteer Ryan Carrillo (not an employee of the Employer), and the Los Angeles Police Department (LAPD) prior to the hearing. The Employer also entered into the record additional subpoenas that the Employer had not served until after the hearing opened and which were directed to the LAPD. In addition, the

[4] In my Partial Decision on Objections and Notice of Hearing, in which I set the instant objection for hearing, I found the Employer failed to submit a sufficient offer of proof that the Union and its agents were responsible for the alleged false police report. Therefore, I set only the issue of third party conduct for hearing but, as noted above, the Employer failed to submit any evidence relevant to either the standard relating to conduct of a party or to conduct by third parties.

Employer also entered into the record additional subpoenas that it had prepared but had not yet served on IAMAW Representative Joe Solis, Union Representative Pieter Clayton, and Union Representative Cristian Murguia.

The Employer's subpoenas to the Union and Ms. Mendoza sought: communications with employees regarding their Union sympathies; communications by the Union or any employee to the LAPD about the alleged police reports at issue; communications with employees referencing any police reports filed; and communications with IAMAW referencing any police reports filed.[5] (Employer's Exhibit 1). With the exception of the LAPD subpoenas, the other subpoenas essentially sought the same information from different sources. (Employer's Exhibits 3 and 7-9).

The subpoenas to the LAPD sought information regarding contact from unidentified individuals from August 1 through December 31, 2017,[6] contact with the LAPD by Sophia Mendoza, Ryan Carrillo, former Union Representative Keegan Cox, Cristian Murguia, Pieter/Pete Clayton, Joseph/Joe Solis, and any individual identifying themselves as a member of either the Union or IAMAW. (Employer's Exhibits 4 and 6).

Prior to the close of the hearing, the Hearing Officer gave the Employer numerous opportunities to make offers of proof regarding the Employer's basis for believing that the outstanding subpoenas it served on the LAPD, IAMAW, and Union volunteer Ryan Carrillo and the subpoenas it had prepared for IAMAW Representative Joe Solis, Union Representative Pieter Clayton, and Union Representative Cristian Murguia would produce probative evidence regarding the alleged false police reports and knowledge of the same by employees in the bargaining unit at issue. In response, the Employer simply stated that it believed the subpoenas to the LAPD could produce probative evidence regarding police reports involving employees in the bargaining unit at issue and that the other subpoenas could produce information about communications between the subpoenaed entities or individuals and employees in the bargaining unit at issue regarding the alleged false police reports. However, the Employer did not provide any factual basis for such a belief other than having knowledge that Site Managers and employees from other facilities, outside of the bargaining unit at issue here, had allegedly complained about false police reports. After giving the Employer a second day to put on evidence and to give any subpoenaed party additional time to respond to the subpoena, the Hearing Officer determined that the Employer's offer of proof was inadequate to keep the record open for any additional days. In light of that, together with my decision not to seek enforcement of the subpoenas, the Hearing Officer closed the record on the second day of hearing.

ii. The Union and Ms. Mendoza's Response to Subpoenas

As noted above, Union Representative/Organizer Sophia Mendoza appeared pursuant to individual subpoenas and pursuant to subpoenas directed to the Custodian of Records for the Union. Ms. Mendoza testified that the Union had no responsive documents other than what was

[5] I note that the Hearing Officer appropriately partially quashed a subpoena that requested the name and contact information of employees of the Employer who participated in the Union's organizing campaign.
[6] The names of the individuals were redacted.

provided. Notably, the Employer did not challenge Ms. Mendoza's contention and did not enter into the record any evidence produced by the Union or Ms. Mendoza related in any way to the alleged false police reports.

Ms. Mendoza further testified to the steps the Union took to comply with the Employer's subpoenas. Specifically, Ms. Mendoza testified that Union staff have only one phone and do not use their personal e-mail addresses for work. In addition to her own records, Ms. Mendoza further specified that the Union's review of the subpoenaed information included other Union representatives that the Union admitted worked on the campaign: Ryan Carrillo, Cristian Murguia, and Keegan Cox. Finally, although Ms. Mendoza acknowledged that IAMAW Representative Pete Clayton and Union Representative Joe Solis attended one or two organizing meetings at the early stages of the campaign, she testified that these two individuals did not otherwise work on the campaign so she did not check with them on any responsive documents to the Employer's subpoenas.

iii. The Standard for Subpoena Enforcement

Section 102.31(d) of the Board's Rules and Regulations provides that

> Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel will, in the name of the Board but on relation of such private party, institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board will be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

However, under Section 3(b) of the Act, the Board is authorized to delegate to the Regional Directors its power under Section 9 of the Act regarding representational matters. The Board may review a Regional Director's action, but that review does not stay the action unless specifically so ordered by the Board. Furthermore, Section 102.65(a) of the Board's Rules and Regulations states, in pertinent part, that the motions made prior to the transfer of the case to the Board shall be filed with the Regional Director, or, if made during the hearing, with the Hearing Officer. Further, the Regional Director may rule on all motions filed with her or she may refer them to the Hearing Officer for ruling. Notably, this includes motions or requests to seek subpoena enforcement. See *SR-73 and Lakeside Avenue Operations LLC*, 365 NLRB No. 119, fn. 2 (2017) (in denying the employer's request for review, the Board found that the Acting Regional Director did not abuse his discretion by refusing to enforce a subpoena from the employer), citing *Northern States Beef*, 311 NLRB 1056 (1993).[7] Accordingly, contrary to the Employer's unsupported assertions in its brief, I have full authority to consider whether to seek

[7] While Chairman Miscimarra dissented concerning the Acting Regional Director's decision to not seek enforcement of the subpoena, he did not challenge the Acting Regional Director's authority to refuse to enforce the Employer's subpoena.

enforcement of the Employer's subpoenas in this matter without having to consult with the General Counsel.

iv. Application of the Standard

Having established that I have the authority to independently consider whether to seek enforcement of the Employer's subpoenas, I adhere to my finding that there is an insufficient basis for seeking enforcement of the subpoenas for the reasons detailed below.

First, the Employer was provided an opportunity to present an offer of proof as to what probative evidence it expected to obtain from the subpoenas. In response, the Employer simply stated that it believed the subpoenas to the LAPD could produce probative evidence regarding police reports involving employees in the bargaining unit at issue and that the other subpoenas could produce information about communications between the subpoenaed entities or individuals and employees in the bargaining unit at issue regarding the alleged false police reports. However, the Employer did not provide any factual basis for such a belief. Since the Employer failed to offer a sufficient offer or proof supported by a sound factual basis, I concluded, and I will adhere to the conclusion, that instituting subpoena enforcement proceedings for the outstanding subpoenas would not be appropriate here. In adhering to this conclusion, I note that in the two days of hearing, the Employer failed to present any evidence at all that employees in the unit at issue were even aware that purportedly there had been false police reports made against individuals who did not support the Union. Nor did the Employer present any evidence at all that police reports had even been made or that they were false. Furthermore, the Employer could have obtained the subpoenaed evidence it sought by other means. Specifically, as noted above, the Employer could have presented Site Managers and the employees from the other facilities who were allegedly subjected to the false police reports, but chose not to do so. Likewise, the Employer could have subpoenaed the six employees in the unit at issue who could have provided the most direct, first-hand testimony about their knowledge of the alleged false police reports and the impact these reports had on them, but the Employer chose not to do so. Furthermore, significantly, even when presented with an opportunity to examine a witness over the alleged false police reports, the Employer did not ask Ms. Mendoza any questions about the alleged conduct or whether she had discussed the alleged conduct with any employees at the location in question. The fact that the Employer chose to not subpoena witnesses and/or present any witness testimony regarding the alleged false police reports supports not seeking enforcement of the Employer's subpoenas. See *Brink's Inc.*, 281 NLRB at 469 (Board considered whether subpoenaed evidence was "obtainable from some other source" as germane to the consideration of whether to revoke a subpoena; for the reasons noted above, the consideration also applies to subpoena enforcement consideration); *SR-73 and Lakeside Avenue Operations LLC*, 365 NLRB No. 119, fn. 2 (2017) (in denying the employer's request for review, the Board found that the Acting Regional Director did not abuse his discretion by refusing to enforce a subpoena from the employer where the Acting Regional Director considered, among other things, the availability of the subpoenaed information from other available witnesses).

Second, the Board has repeatedly held that a Hearing Officer has discretion to revoke or refuse to enforce subpoenas that are being used as part of a "fishing expedition" or that would lead to irrelevant or cumulative testimony. *See e.g., Burns Int'l Sec. Serv. Inc.*, 278 NLRB 565 (1986); *Spartan Dep't Stores*, 140 NLRB 608 (1963); *Millsboro Nursing* 327 NLRB 879 (1999). In *Burns*, the employer claimed prejudicial error based on the Hearing Officer's decision to revoke witness subpoenas that the employer claimed were critical to the presentation of its case. *Burns*, 278 NLRB at 565-66. The Board held that the Hearing Officer properly revoked the subpoenas based on the employer's failure to introduce any evidence supporting its claims and because it was clear that the subpoenas would be a "mere fishing expedition." *Id.* at 566. Similarly, in *Spartan Dep't Stores*, the Board rejected the union's claim that the Hearing Officer committed prejudicial error by refusing to delay the hearing in order to enforce subpoenas. *Spartan Dep't Stores*, 140 NLRB at 608, fn 2. Instead, the Board held that the Hearing Officer's decision not to enforce the subpoenas was appropriate given that the union failed to offer any evidence that the testimony sought would help develop its case. *Id.* at fn. 2. The Board determined that to allow the Board's subpoena powers to be manipulated in this way would be contrary to the policies of the Act. *Id.* Likewise, in *Millsboro Nursing*, the Board affirmed the Hearing Officer's decision to quash a subpoena by the employer that sought information regarding the union's alleged misconduct in support of its objection, namely information regarding the union's alleged payment to employees to attend union meetings. *Millsboro Nursing*, 327 NLRB at 879, fn. 2. In affirming the Hearing Officer's decision to quash the subpoena, the Board stated:

> The hearing officer specifically found, however, that at the hearing the Employer presented "no evidence ... to establish that the Union offered or paid money to any employee for their support of the Union or for their attendance at union meetings." Thus, the record provides no basis on which we may reasonably believe that the desired documents contain evidence of improper payments. Under these circumstances, we agree with the hearing officer that the Employer's broad request for the production of records is a mere "fishing expedition" for which it is not entitled to a subpoena from the Board.

Id. Similar to the cases cited above, the circumstances here support finding that the Employer's subpoenas constitute a mere "fishing expedition." Based on the lack of evidence in the record, I cannot even conclude that the police reports occurred or that the police reports were false in nature. In addition, because there is no evidence that any unit voter had any knowledge of the alleged conduct, the record evidence does not support finding that the alleged conduct, even if true, had a tendency to interfere with employee free choice in the vote. Given the foregoing, the Employer's subpoenas are, at best, a fishing expedition because, like in *Millsboro Nursing*, in light of the total absence of evidence in the record regarding the alleged false police reports, "the record evidence provides no basis on which [to] reasonably believe that the desired documents contain evidence of [misconduct]."). *Id.*

Third, with respect to the Employer's subpoenas to the LAPD, these subpoenas would have, at most, established that police reports were made and what the LAPD did in relation

thereto. However, any evidence produced in response to these subpoenas would not have disclosed what impact the police reports had on unit employees, nor would it have established dissemination of the police reports among unit employees.

In addition, I note that in light of the Union's and Mendoza's response to the Employer's subpoena *duces tecum*, the other subpoenas *duces tecum*, with the exception of those to the LAPD, would have essentially produced duplicative information. See *Brink's Inc.*, 281 NLRB 468, 469 (1986) (in the context of considering a petition to revoke, the Board noted that in considering whether a subpoena should be revoked "for any other reason sufficient in law" as outlined in the Board's Rules and Regulations, it is appropriate – under the Federal Rules of Evidence – to consider whether the subpoenaed information is "'unreasonably cumulative or duplicative, or … obtainable from some other source that is more convenient, less burdensome, or less expensive.'"). Admittedly, the Board's Rules and Regulations do not explicitly identify a subpoena being duplicative as a basis for declining to seek enforcement. However, just as the Board's analysis in *Brink's Inc.* found it appropriate to rely on the "for any other reason sufficient in law" language in Board's subpoena revocation standard to consider the duplicative nature of a subpoena, so too is it appropriate here to consider the duplicative nature of the subpoenas because the enforcement standard outlined above includes similar language; specifically, Section 102.31(d) states that subpoena enforcement should not be instituted if it "would be inconsistent with law." Thus, it is significant here that the Employer failed to make a sufficient offer of proof, beyond speculation, that its subpoenas *duces tecum* to IAMAW, Carrillo, Murguia, Solis, and Clayton would produce probative information not otherwise covered by its subpoenas to the Union and Mendoza. Moreover, based on the fact that no other individuals, besides the Employer's employees, actively participated in the organizing campaign, the subpoenas directed to IAMAW, Carrillo, and Murguia were essentially duplicative of the subpoenas directed to the Union and Mendoza because, as noted above, they requested the same information from a different source. As to the subpoenas issued to Solis and Clayton, not only were they duplicative of the subpoenas to the Union and Mendoza, but it is unlikely they would have produced any other relevant information because Solis and Clayton had very limited involvement in the early stages of the Union's campaign, whereas the alleged objectionable conduct supposedly occurred between October 24, 2017 and November 27, 2017.

Finally, I find the Hearing Officer went above-and-beyond to afford the Employer an opportunity to present its case. In this regard, at the close of the first day of hearing, the Hearing Officer decided to keep the record open for the Employer to present additional witnesses. Yet, when the hearing resumed on the second day, the Employer still had no witnesses to testify in support of its objection and, instead, had prepared to issue additional subpoenas to IAMAW Representative Joe Solis, Union Representative Pieter Clayton, Union Representative Cristian Murguia, and the LAPD.

Based on the foregoing, it is clear – contrary to the Employer's assertions – that my conclusion that I would not seek enforcement of the subpoenas is not based on a consideration of the relevance of the subpoenaed information. Moreover, to the extent that the Hearing Officer's report may suggest that the timing of the issuance of the subpoenas was a factor in the Region's

decision not to enforce the subpoenas, as argued by the Employer, such a factor was not a significant one and – as established by the foregoing analysis – not a necessary one because even without it, there were and are sufficient grounds not to seek enforcement of the subpoenas.

Accordingly, I adhere to my decision not to seek enforcement of the Employer's subpoenas.

v. Closing the Record

In addition to excepting to my decision not to enforce the subpoenas, the Employer also excepts to the Hearing Officer's decision to close the record. However, because I properly concluded I would not seek enforcement of the subpoenas, there was no reason to keep the record open any longer than it had been kept open in order to afford subpoenaed witnesses the standard five-day period to submit a petition to revoke the subpoena or, alternatively, to produce the subpoenaed documents. Notably, all of the subpoenas served prior to the opening of the record had production dates of January 29, 2018, the first day of hearing. Thus, because these subpoenas required production by the first day of the hearing, waiting additional days in the hopes that the subpoenaed parties would comply with the subpoenas at a later date was not necessary for the same reasons as those outlined above regarding enforcement of the subpoenas. Accordingly, the Hearing Officer properly closed the record on January 30, 2018.

C. The Hearing Officer's Recommendations

With respect to the Employer's exception that the Hearing Officer transgressed her authority by recommending that a Certification of Representative issue in this matter, I disagree. The Hearing Officer discharged her duties under Section 102.64(b) of the Board's Rules and Regulations and prepared a report containing findings of fact and recommendations on the issues as required under Section 102.69(c)(1)(iii). I find that the Hearing Officer here has fully satisfied these requirements and that she did not exceed her authority.

D. The Obligation to Investigate Violations Unrelated to the Act

The Employer incorrectly asserts, without any supporting case law or statutory authority, that the Board is obligated to investigate violations of the law that implicate a statute or regulation other than the Act. The statutory authority Congress granted to the Board is solely limited to violations of the Act. Thus, the Board has no obligation or duty to investigate violations unrelated to the Act. Accordingly, all of the Employer's exceptions related to this issue are without merit.

IV. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's report and recommendations, and the exceptions and arguments made by the Employer, I find no merit to any of the Employer's exceptions. Therefore, I overrule the Employer's

Objection No. 2, and, accordingly, I certify the Union as the collective-bargaining representative of the bargaining unit.

V. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for **National Union of Healthcare Workers (NUHW)**, and that it is the exclusive representative of all the employees in the following bargaining unit:

Included: All full-time, regular part-time, and per diem Technical employees employed by the Employer at its facility at San Fernando Valley Interventional Radiology and Imaging Center located at 16311 Ventura Blvd., Suite 120, Encino, CA 91436.

Excluded: All other employees, managers, confidential employees, physicians, service employees, office clericals, and guards and supervisors as defined by the Act, as amended.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington **by March 28, 2018**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

March 14, 2018

Mori Rubin

MORI RUBIN
Regional Director, Region 31
National Labor Relations Board

Attachment: Notice of Bargaining Obligation

RadNet Management, Inc. d/b/a
San Fernando Valley Interventional
Radiology and Imaging Center
Case 31-RM-209388

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,[1] an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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[1] Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102

RIN 3142-AA12

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Request for information.

SUMMARY: The National Labor Relations Board (the Board) is seeking information from the public regarding the representation election regulations located at 29 CFR parts 101 and 102 (the Election Regulations), with a specific focus on amendments to the Board's representation case procedures adopted by the Board's final rule published on December 15, 2014 (the Election Rule or Rule). As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the Board has an interest in reviewing the Election Rule to evaluate whether the Rule should be (1) retained without change, (2) retained with modifications, or (3) rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule's adoption. Regarding these questions, the Board believes it will be helpful to solicit and consider public responses to this request for information.

DATES: Responses to this notice and request for information must be received by the Board on or before February 12, 2018. No late responses will be accepted. Responses are limited to 25 pages.

ADDRESSES: You may submit responses by the following methods: *Internet*—Electronic responses may be submitted by going to www.nlrb.gov and following the link to submit responses to this Notice and Request for Information. The Board encourages electronic filing. *Delivery*—If you do not have the ability to submit your response electronically, responses may be submitted by mail to: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570. Because of security precautions, the Board experiences delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting responses. It is not necessary to submit responses by mail if they have been filed electronically on www.nlrb.gov. If you submit responses by mail, the Board recommends that you confirm receipt of your delivered responses by checking www.nlrb.gov to confirm that your response is posted there (allowing time for receipt by mail). Only responses submitted as described above will be accepted; *ex parte* communications received by the Board will be made part of the record and will be treated as responses only insofar as appropriate.

The Board requests that responses include full citations or internet links to any authority relied upon. All responses submitted to www.nlrb.gov will be posted on the Agency's public website as soon after receipt as practicable without making any changes to the responses, including

changes to personal information provided. The Board cautions responders not to include in the body of their responses personal information such as Social Security numbers, personal addresses, personal telephone numbers, and personal email addresses, as such submitted information will become viewable by the public when the responses are posted online. It is the responders' responsibility to safeguard their information. The responders' email addresses will not be posted on the Agency website unless they choose to include that information as part of their responses.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

On December 15, 2014, the Board published the Election Rule, which amended the Board's prior Election Regulations. 79 Fed. Reg. 74308 (2014). The Election Rule was adopted after public comment periods in which tens of thousands of public comments were received. The Rule was approved by a three-member Board majority, with two Board members expressing dissenting views. Thereafter, the Rule was submitted for review by Congress pursuant to the Congressional Review Act. In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the Board's rule and declaring that it should have no force or effect. President Obama vetoed this resolution on March 31, 2015. The amendments adopted by the final rule became effective on April 14, 2015, and have been applicable to all representation cases filed on or after that date. Multiple parties initiated lawsuits challenging the facial validity of the Election Rule, and those challenges were rejected. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2015), affg. No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015). These rulings did not preclude the possibility that the Election Rule might be invalid as applied in particular cases.

II. Authority Regarding Board Review of the 2014 Election Rule Amendments

Agencies have the authority to reconsider past decisions and rules and to retain, revise, replace, and rescind decisions and rules. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–515 (2009); *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038–1039,1043 (D.C. Cir. 2012).

The Election Rule has been in effect for more than 2 years. The current five-member Board includes only two members who participated in the 2014 rulemaking: Member Pearce, who joined the majority vote to adopt the final rule, and Chairman Miscimarra, who joined former Member Johnson in dissent. In addition to the proceedings described above, and other congressional hearings and proposed legislation, numerous cases litigated before the Board have presented significant issues concerning application of the Election Rule. See, e.g., *UPS Ground*

Freight, Inc., 365 NLRB No. 113 (2017); *European Imports, Inc.*, 365 NLRB No. 41 (2017); *Yale University*, 365 NLRB No. 40 (2017); *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016).

III. Request for Information from the Public

The Board invites information relating to the following questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

IV. Response to the Dissents

It is surprising that the Board lacks unanimity about merely posing three questions about the 2014 Election Rule, when none of the questions suggests a single change in the Board's representation-election procedures. Nonetheless, two dissenting colleagues object to the request for information regarding the Election Rule because, among other things, they believe that (i) the Election Rule has worked effectively (or even, in Member Pearce's estimation, essentially flawlessly), (ii) any request for information from the public about the Rule is premature, (iii) merely requesting information reveals a predetermination on our part to revise or rescind the Election Rule, and (iv) future changes will be based on "alternative facts" and "manufactur[ed]" rationales.

It is the Board's duty to periodically conduct an objective and critical review of the effectiveness and appropriateness of our rules. In any event, our dissenting colleagues would answer the above Question 1 in the affirmative: they believe the Election Rule should be retained without change. That is their opinion. However, the Board is seeking the opinions of others: unions, employers, associations, labor-law practitioners, academics, members of Congress, and anyone from the general public who wishes to provide information relating to the questions posed above. In addition, we welcome the views of the General Counsel and also the Regional Directors, whose experience working with the 2014 Election Rule makes them a valuable resource.

One thing is clear: issuing the above request for information is unlike the process followed by the Board majority that adopted the 2014 Election Rule. The rulemaking process that culminated in the 2014 Election Rule (like the process followed prior to issuance of the election rule adopted by Members Pearce and Becker in 2011) started with a lengthy proposed rule that outlined dozens of changes in the Board's election procedures, without any prior request for information from the public regarding the Board's election procedures. By contrast, the above request does not suggest even a single specific change in current representation-election

procedures. Again, the Board merely poses three questions, two of which contemplate the possible retention of the 2014 Election Rule.[1]

V. Dissenting Views of Member Mark Gaston Pearce and Member Lauren McFerran

MEMBER PEARCE, dissenting.

I dissent from the Notice and Request for Information, which should more aptly be titled a "Notice and Quest for Alternative Facts." It ignores the Final Rule's success in improving the Board's representation-case procedures and judicial rejection of dissenting Members Miscimarra and Johnson's legal pronouncements about the Final Rule.

Some two and a half years ago, the National Labor Relations Board concluded lengthy rulemaking pursuant to the Administrative Procedure Act to reexamine our representation-case procedures. We had proposed a number of targeted solutions to discrete problems identified with the Board's methods of processing petitions for elections with a goal of removing unnecessary barriers to the fair and expeditious resolution of representation cases. The rulemaking sought to simplify representation-case procedures, codify best practices, increase transparency and uniformity across regions, eliminate duplicative and unnecessary litigation, and modernize rules concerning documents and communication in light of changing technology. After a painstaking three and a half year process, involving the consideration of tens of thousands of comments generated over two separate comment periods totaling 141 days, and 4 days of hearings with live questioning by the Board Members, we issued a final rule that became effective on April 14, 2015. *Representation-Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

The Final Rule was careful and comprehensive—spanning over 100 pages of the Federal Register's triple-column format in explaining the 25 changes ultimately made to the Board's rules and regulations. For each change, the Final Rule identified the problem to be ameliorated, catalogued every type of substantive response from the public, and set forth the Board's analysis as to why the proposed amendment was either being adopted, discarded or modified.[1]

Complying with the rulemaking process, and dealing with the deluge of public comments generated, was not an easy task for our Agency. Thousands of staff hours were expended; research and training was required into statutes and procedures with which we were unfamiliar;

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[1] Member McFerran contends that the Board's open-ended request "depart[s] from the norms of rulemaking under the Administrative Procedure Act." Her contention is misplaced. The Board is merely requesting information. We are not engaged in rulemaking.

[1] See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 229 (5th Cir. 2016) (noting that the Board "conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions"); *Chamber of Commerce of the United States of America v. NLRB*, 118 F.Supp.3d 171, 220 (D.D.C. 2015) ("[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters' many concerns[.]").

expensive licensing was purchased for software to sort, and websites to house, the tens of thousands of comments received; and contributions were made from all corners of the Agency. Through this extensive process, the fundamental questions were asked and answered. The amended procedures have now been in place for some two and a half years, and my colleagues show no serious justification for calling them into question.

Indeed, it is with some irony that I am reminded of the sentiment expressed in dissent to the Final Rule in 2014 that "the countless number of hours spent by Board personnel in rulemaking" would be better spent expeditiously processing cases. 79 FR at 74457. Yet, in the past 9 months, the Board's case output has fallen precipitously,[2] and we face the specter of budget cuts that could further hamper our ability to perform our statutory mission. Now, the majority will burden the Agency with the exercise of continued rulemaking in an area that has already been thoroughly addressed.

As a consequence, our attention will be diverted from case processing to explore the rollback of a Final Rule that has provided a bounty of beneficial changes, and which applies equally to initial organizing campaigns and efforts to decertify incumbent unions. A non-exhaustive list includes:

- Parties may now use modern technology to electronically file and serve petitions and other documents, thereby saving time and money, and affording non-filing parties the earliest possible notice.
- Petitions and election objections must be supported, and must be served on other parties.
- Board procedures are more transparent, and more meaningful information is more widely available at earlier stages of our proceedings.
- Issues in dispute are clarified, and parties are enabled to make more informed judgments about whether to enter into election agreements.
- Across regions, employees' Section 7 rights are afforded more equal treatment, the timing of hearings is more predictable, and litigation is more efficient and uniform.
- Parties are more often spared the expense of litigating, and the Board is more often spared the burden of deciding, issues that are not necessary to determine whether a question of representation exists, and which may be mooted by election results.
- The Board enjoys the benefit of a regional director decision in all representation cases.
- Board practice more closely adheres to the statutory directive that requests for review not stay any action of the regional director unless specifically ordered by the Board.
- Nonemployer parties are able to communicate about election issues with voters using modern means of communication such as email, texts and cell phones, and are less likely to challenge voters out of ignorance.

[2] Comparing the period February 1 through October 2017, to the equivalent nine-month period from 2016, the Board's output of contested unfair labor practice decisions and published representation case decisions has been reduced by approximately 45 percent (i.e. a drop in excess of 100 cases). Searches in the Board's NxGen case processing software show that from February 1, 2017, to October 31, 2017, the Board issued 136 decisions in contested unfair labor practice cases and published representation cases, while from February 1, 2016, to October 31, 2016, the Board issued 247 such decisions.

- Notices of Election are more informative, and more often electronically disseminated.
- Employees voting subject to challenge are more easily identified, and the chances are lessened of their ballots being comingled.

And all of this has been accomplished while processing representation cases more expeditiously from petition, to election, to closure.

So why would the majority suggest rescinding all of these benefits to the Agency, employees, employers, and unions? In evaluating that question, it is worthwhile to remind ourselves of a basic tenet of administrative law: while an agency rule, once adopted, is not frozen in place, the agency must offer valid reasons for changing it and must fairly account for the benefits lost as a result of the change. *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3d 338, 351-352 (1st Cir. 2004).

None of the reasons offered by today's majority constitutes a persuasive justification for requesting information from the public, let alone for rescinding or modifying the Final Rule. The majority notes that the Final Rule has been in effect for more than two years. But the fact that two years have transpired since the Final Rule was adopted hardly constitutes a reason for rescinding or modifying it. The Board has a wealth of casehandling information that can be obtained through an analysis of our own records. And because the Board has access to all regional director pre- and post-election decisions, and because parties may request Board review of any action taken by the regional directors, the Board already is aware of the nature of any complaints about how the Final Rule has worked in particular cases. As for reverting to the prior representation rules, the public already had the opportunity to comment on whether they should be maintained or modified.

The majority next points to a change in Board member composition, but by itself, that is not a sufficient reason for rescinding, modifying, or requesting information from the public concerning the Final Rule. The majority also cites a grand total of four cases (out of the many cases) applying the Final Rule, but none provides any reason to invite public comment on the Final Rule, much less for the Board to reconsider it. While the majority also cites congressional efforts to overturn the Final Rule, they did not succeed, and cannot be used to demonstrate that the Final Rule contravenes our governing statute. As the courts have recognized, "It is well-established that 'the view of a later Congress cannot control the interpretation of an earlier enacted statute.'" *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (quoting *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996)). Finally, as the majority is forced to concede, every legal challenge to the Final Rule has been struck down by the courts.

In evaluating the appropriateness of the Notice and Request for Information, it is also worth journeying back in time to consider the pronouncements and dire predictions voiced by then-Members Miscimarra and Johnson about the Final Rule when it issued. In considering these matters, the reader need not take my word, for the dissent appears in the Federal Register.

Suffice it to say that the Final Rule's dissenters were so wrong about so much. They did not simply disagree with the Board's judgments, but instead claimed that the Final Rule violated the NLRA, the APA, and the U.S. Constitution.

The Final Rule dissent pronounced that the Rule's amendments contradicted our statute and were otherwise impermissibly arbitrary. 79 FR at 74431. It was wrong on both counts. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The "rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]"); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting claims that the Final Rule contravenes either the NLRA or the Constitution or is arbitrary and capricious or an abuse of the Board's discretion).

The Final Rule dissent pronounced that the Rule's primary purpose and effect was to shorten the time from the filing of petition to the conduct of the election, and that this violated the NLRA and was otherwise arbitrary or capricious. 79 FR at 74430, 74433-74435. It was wrong on all three counts. See *ABC of Texas*, 826 F.3d at 227-228 (noting that the Board properly considered delay in scheduling elections and that the Board also reasoned that the final rule was necessary to further "a variety of additional permissible goals and interests"); *Chamber of Commerce*, 118 F.Supp.3d at 218-219 (rejecting claim that the Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, and noting that many of the Rule's provisions do not relate to the length of the election cycle).

The Final Rule dissent pronounced that the Rule's granting regional directors discretion to defer litigation of individual eligibility issues at the pre-election hearing was contrary to the statute and was arbitrary and capricious in violation of the APA. 79 FR at 74430, 74436-74438, 74444-74446. The courts rejected those arguments. See *Chamber of Commerce*, 118 F. Supp. 3d at 181, 195-203 ("Granting regional directors the discretion to decline to hear evidence on individual voter eligibility and inclusion issues does not violate the NLRA [and] is not arbitrary and capricious."); *ABC of Texas*, 826 F.3d at 220-223. See also *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 * 2, *7 (W.D. Tex. 2015).

The Final Rule dissent pronounced that the Rule violated the Act and the Constitution by infringing on protected speech and by providing an insufficient time period for employees to understand the issues before having to vote, thereby compelling them to vote now, understand later. (79 FR at 74430-74431, 74436, 74438). But these claims were also rejected by the courts. See *Chamber of Commerce*, 118 F. Supp. 3d at 181-182, 189, 206-208, 220 ("The elimination of the presumptive pre-election waiting period does not violate the NLRA or the First Amendment" and "[p]laintiffs have failed to show that the Final Rule inhibits . . . debate in any meaningful way."); *ABC of Texas*, 826 F.3d at 220, 226-227 (rejecting claim that "the cumulative effect of the rule change improperly shortens the overall pre-election period in violation of the 'free speech' provision of the Act" or inhibits meaningful debate).

The Final Rule dissent pronounced that the Rule ran afoul of the APA because the Board failed to demonstrate a need for the amendments. 79 FR 74431, 74434. Here again, the courts rejected that contention. See, e.g., *Chamber of Commerce*, 118 F. Supp. 3d at 219-220 ("the Board has offered grounds to show that the issues targeted by the Final Rule were sufficiently tangible to warrant action"); *ABC of Texas*, 826 F.3d at 227-229.

The Final Rule dissent pronounced that the Rule's accelerated deadlines and hearing provisions violated employers' due process rights and the NLRA's appropriate hearing requirement. 79 FR at 74431-74442, 74451. Wrong. See *Chamber of Commerce*, 118 F.Supp.3d at 177, 205-206 (due process challenge does "not withstand close inspection" because, among other reasons, it is "predicated on mischaracterizations of what the Final Rule actually provides"); *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 *2, *5-*7, affd, 826 F.3d at 220, 222-223 ("the rule changes to the pre-election hearing did not exceed the boundaries of the Board's statutory authority").

The Final Rule dissent pronounced that the Rule's provision making Board review of regional director post-election determinations discretionary contravened the Board's duty to oversee the election process and was arbitrary and capricious. 79 FR at 74431, 74449-74451. Wrong again. See *Chamber of Commerce*, 118 F. Supp. 3d at 215-218 (rejecting claims that "the Final Rule's 'elimination of mandatory Board review of post-election disputes . . . contravenes the Board's 'statutory obligation to oversee the election process'" and is arbitrary and capricious).

The Final Rule dissent pronounced that the Rule's voter list provisions were not rationally justified or consistent with the Act, did not adequately address privacy concerns, and imposed unreasonable compliance burdens on employers. 79 FR at 74452, 74455. Wrong on all counts. See *Chamber of Commerce*, 118 F. Supp. 3d at 209-215 ("The Employee Information Disclosure Requirement [in the Rule's voter list provisions] does not violate the NLRA," and "is not arbitrary and capricious;" the Board did not act arbitrarily in concluding that "the [r]equirement ensures fair and free employee choice" and "facilitates the public interest;" and "the Board engaged in a lengthy and thorough analysis of the privacy risks and other concerns raised by the commenters before reaching its conclusion that the Employee Information Disclosure Requirement was warranted."); *ABC of Texas*, 826 F.3d at 223-226 (rejecting claims that the voter list provisions violate the NLRA and conflict with federal laws that protect employee privacy; that the provisions "are arbitrary and capricious under the APA because the rule disregards employees' privacy concerns," and "place an undue, substantial burden on employers"); see also *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 *2, *8-*11.

Apart from their wrong-headed views concerning the legal merits of the Rule, the Final Rule dissenters made a number of erroneous predictions regarding how the Final Rule would work in practice. But as far-fetched as I found these speculations in 2014, one can now see that these predictions are refuted by the Board's actual experience administering the Final Rule. A quick review of several published agency statistics shows some of their most notable speculations of dysfunction to be completely unfounded.

The Final Rule dissenters speculated that the changes made by the Rule would drive down the Board's historically high rate of elections conducted by agreement of the parties either because the Final Rule does not provide enough time to reach agreement, 79 FR 74442, or because parties can no longer stipulate to mandatory Board review of post-election disputes, 79 FR 74450. They argued, "[e]ven if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction

of purported delay due to the Final Rule's implementation." 79 FR at 74450. But they were wrong. Following the Final Rule's implementation, the Board's election agreement rate has actually increased.[3]

Additionally, the Final Rule dissenters claimed that the Rule would do little to address those few representation cases that in their view involved too much delay, namely those cases that take more than 56 days to process from petition to election. 79 FR at 74456-57.[4] But, in fact, the percentage of elections that were conducted more than 56 days from petition has decreased since the Final Rule was adopted.[5] Moreover, for contested cases—the category which consistently failed to meet the 56-day target—the Final Rule has reduced the median time from petition to election by more than three weeks.[6]

The Final Rule dissent further hypothesized that whatever time-savings might be achieved in processing cases from petition to election, there was a likelihood that "the overall time needed to resolve post-election issues will increase." 79 FR at 74435. Here again, the dissent was wrong. The Agency's 100-day closure rate—which by definition takes into account a representation case's overall processing time—is better than ever. In FY 2017, the second fiscal year following the Final Rule's implementation, the Agency achieved a historic high of closing 89.9% of its representation cases within 100 days of a petition's filing. And in FY 2016, the first fiscal year following the Final Rule's implementation, the Agency's representation case closure rate of 87.6% outpaced all but one of the six years preceding the Final Rule.[7]

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[3] See Percentage of Elections Conducted Pursuant to Election Agreements in FY2017, *www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections* (reporting a post-Final Rule election agreement rate of 91.7% in fiscal year (FY) 2017; past versions of this chart reported a post-Final Rule election agreement rate of 91.7% in FY 2016, and pre-Final Rule election agreement rates of 91.1% for both FY 2014 and FY 2013).

[4] See also 79 FR at 74434 (The dissenters highlighted pre-Final Rule fiscal year 2013 as a period in which 94.3% of elections were conducted within 56 days of the petition as a means of concluding that "by the Board's own measures, less than 6% of elections were unduly 'delayed.'"). Of course, as explained in the Final Rule, the Board disagreed that only those cases taking more than 56 days were worthy of attention. 79 FR at 74317.

[5] See Performance Accountability Reports, FYs 2013 – 2017, *www.nlrb.gov/reports-guidance/reports* (reporting that, pre-Final Rule, the Agency processed 94.3% of its representation cases from petition to election in 56 days in FY 2013 and 95.7% in FY 2014, as compared to post-Final Rule rates of 99.1% in FY 2016 and 98.5% in FY 2017).

[6] See Median Days from Petition to Election, *www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections* (reporting post-Final Rule median processing times for contested cases as 36 days in FY 2017 and 35 days in FY 2016, as compared to pre-Final Rule median processing times ranging from 59 to 67 days in FYs 2008 to 2014). See also Annual Review of Revised R-Case Rules, *www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules* (reporting that in the first calendar year following the Final Rule's implementation, the median time to process contested cases from petition to election fell from 64 to 34 days).

[7] See Performance Accountability Reports, fiscal years 2013 – 2017, *www.nlrb.gov/reports-guidance/reports* (indicating the following representation case 100-day closure rates: FY 2017 -

All of the foregoing raises the question: if the Final Rule dissent's claims of statutory infirmity have been roundly rejected by the courts, and the predictions that the Final Rule would cause procedural dysfunction have been undercut by agency experience, why is comment being solicited as to whether the Final Rule should be further amended or rescinded? The answer would appear to be all too clear. When the actual facts do not support the current majority's preferred outcome, the new Members join Chairman Miscimarra to look for "alternative facts" to justify rolling back the Agency's progress in the representation-case arena.

It is indeed unfortunate that when historians examine how our Agency functioned during this tumultuous time, they will have no choice but to conclude that the Board abandoned its role as an independent agency and chose to cast aside reasoned deliberation in pursuit of an arbitrary exercise of power.

Accordingly, I dissent.

MEMBER McFERRAN, dissenting.

On April 14, 2015—after thousands of public comments submitted over two periods spanning 141 days, four days of public hearings, and over a hundred, dense *Federal Register* pages of analysis—a comprehensive update of NLRB election rules and procedures took effect. The Election Rule was designed to simplify and modernize the Board's representation process, to establish greater transparency and consistency in administration, and to better provide for the fair and expeditious resolution of representation cases. As stated in the Rule's *Federal Register* preamble:

> While retaining the essentials of existing representation case procedures, these amendments remove unnecessary barriers to the fair and expeditious resolution of representation cases. They simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated. Unnecessary delay is reduced. Procedures for Board review are simplified. Rules about documents and communications are modernized in light of changing technology.

79 Fed. Reg. 74308 (Dec. 15, 2014).

During the short, two-and-a-half years since the Rule's implementation, there has been nothing to suggest that the Rule is either failing to accomplish these objectives or that it is causing any of the harms predicted by its critics. As Member Pearce catalogs in his dissent, by every available metric the Rule appears to have met the Board's expectations, refuting predictions about the Rule's supposedly harmful consequences. The majority makes no effort to rebut Member Pearce's comprehensive analysis. The preliminary available data thus indicates that the rule is achieving its intended goals—without altering the "playing field" for unions or

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89.9%, FY 2016 - 87.6%, FY 2014 - 88.1%; FY 2013 - 87.4%; FY 2012 - 84.5%; FY 2011 - 84.7%; FY 2010 - 86.3%; FY 2009 -84.4%).

employers in the election process.[1] The validity of the Rule, moreover, has been upheld in every court where it has been challenged.[2] In short, the Rule appears to be a success so far.

Nonetheless, today a new Board majority issues a Request for Information (RFI) seeking public opinion about whether to retain, repeal, or modify the Rule—and signaling its own desire to reopen the Rule. Of course, administrative agencies ought to evaluate the effectiveness of their actions, whether in the context of rulemaking or adjudication, and public input can serve an important role in conducting such evaluations.[3] But the nature and timing of this RFI, along with its faulty justifications, suggests that the majority's interest lies not in acquiring objective data upon which to gauge the early effectiveness of the Rule, but instead in manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board. Because it seems as if the RFI is a mere fig leaf to provide cover for an unjustified attack on a years-long, comprehensive effort to make the Board's election processes more efficient and effective, I cannot support it. I would remain open, however, to a genuine effort to gather useful information about the Rule's effectiveness to this point.

I. *The RFI is premature, poorly crafted, and unlikely to solicit meaningful feedback.*

Initially, it seems premature to seek public comment on the Rule a mere two-and-a-half years after the Rule's implementation.[4] The Rule has been in place for less time at this point

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[1] See NLRB, *Annual Review of Revised R-Case Rules*, available at *https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules* (showing, in comparison between pre- and post-Rule representation cases, modest decrease in time elapsed from petition to election, no substantial change in party win-rates, and largely stable number of elections agreed to by stipulation); NLRB, *Graphs and Data, Petitions and Elections*, available at *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections* (showing similar outcomes, based on fiscal-year data on representation cases).

[2] See *Assoc. Builders and Contractors v. NLRB*, 826 F.3d 215 (5th Cir. 2016) (rejecting multiple facial challenges to Rule); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (same).

[3] I have no objection at all to seeking public participation in the Board's policymaking, as reflected in the Board's standard practice of inviting amicus briefs in major cases, including those where the Board is reconsidering precedent. Ironically, the new majority has now broken with that practice for no good reason in reversing recent precedent. See, e.g., *UPMC*, 365 NLRB No. 153 (2017) (Member McFerran, dissenting). I hope this unfortunate omission does not signal a permanent change to the Board's approach in seeking public input in major cases.

[4] I would be surprised if even the most ardent advocates of regulatory review would support such a short regulatory lookback period. Indeed, Section 610 of the Regulatory Flexibility Act, for example, contemplates that agencies may take up to 10 years—significantly longer than our 2-plus years' experience with the Rule—before they may adequately assess a rule's effectiveness. See 5 U.S.C. Sec. 610 (providing that agencies shall develop plan "for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule").

than the rulemaking process took from beginning to end.[5] Moreover, as noted, so far the Rule appears to be achieving its stated ends without producing the dire consequences some purported to fear. In short, there does not appear to be any present basis or need for this RFI.

Nevertheless, as stated, I am not opposed to genuine efforts to meaningfully evaluate the Rule's performance to date. But I believe that any useful request for information would have to seek comprehensive information on the precise effects of the specific changes made by the Rule.[6] In my view, such detailed information is essential to facilitating meaningful analysis of the Rule's effectiveness, and to determining whether this or any future request for information is warranted. In fact, precisely because agencies benefit most from receiving specific rather than generalized feedback, an agency's typical request for information (unlike this RFI) *follows* the agency's assessment and identification of what particular information would be useful in evaluating a rule's effectiveness.[7] Indeed, other agencies' requests for information have often posed specific questions reflecting their own considered analysis of what aspects of rulemaking might require further inquiry and are geared toward the acquisition of concrete facts from the public.[8]

The majority's request is not framed to solicit detailed data, or even informed feedback. The broad questions it poses, absent any empirical context, amount to little more than an open-

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[5] The Board's original notice of proposed rulemaking was published on June 22, 2011. The final rule upheld by the courts was published on December 15, 2014, with an effective date of April 14, 2015.

[6] For example, to assess the success of some of the Rule's intended new efficiencies, it would be useful to have quantitative data on: motions for extensions and motions to file a document out-of-time; missed deadlines; motions for stays of election or other extraordinary relief; eligibility issues deferred until after the election, and whether such issues were mooted by the election results. This type of data would be valuable not only to decision makers at the Agency, but also to the public in determining how to evaluate and comment on the effectiveness of the Rule.

[7] The majority states that it is the Board's duty to periodically review its rules. Without a doubt, the Board must monitor its rules to be sure that they are meeting their goals and to help the Board better effectuate the statute. But choosing to reopen the Election Rule now is highly dubious. The Board has many longstanding rules—addressing issues from industry jurisdiction to health care bargaining units—which have never been reviewed after promulgation. Yet the majority chooses the newly-minted Election Rule, among all others, for attention—with no explanation for its choice. Given the resources required of both the agency and interested parties when the Board revisits a rule, the Board's periodic review should reflect the exercise of reasoned judgment. In this case, the majority has failed to identify any reasonable basis for seeking public input on the Election Rule at this time. Nor has the majority made any effort to obtain or analyze easily available data that conceivably could support issuing an RFI.

[8] See, e.g., Dept. of the Treasury, *Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Volcker Rule); Request for Public Input*, 82 Fed. Reg. 36692, Aug 7, 2017 (enumerating lengthy list of specific, data-oriented questions); Dept. of Labor, Employee Benefits Security Admin., *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions*, 82 Fed. Reg. 31278, July 6, 2017 (same).

ended "raise-your-hand-if-you-don't-like-the-Rule" straw poll. That is hardly a sound approach to gathering meaningful feedback.

The irony, of course, is that, if the majority were sincerely interested in beginning to assess the Rule's effectiveness, the best initial source of empirical, objective data lies *within* the Agency itself. The Board's regional offices process and oversee the litigation of every single election petition filed under the Rule. All the majority needs to do is ask the Board's General Counsel to prepare a comprehensive report highlighting all relevant factual elements of the processing of election petitions over the past 2-plus years.[9] If the resulting data were to suggest that, after such a short time on the books, the Rule is in need of refinement, or that additional public input could enhance the Board's understanding of the Rule's functioning, the Board might then craft tailored questions designed to elicit meaningful, constructive feedback.

Unfortunately, in addition to framing a vague, unfounded inquiry that is unlikely to solicit useful information, the majority's request also establishes an unnecessarily rushed comment process that is likely to frustrate those interested parties who might actually hope to provide meaningful input. To the extent members of the public wish to provide informed feedback on the Rule, they will need information. In the absence of a comprehensive analysis from the General Counsel, outside parties are likely to seek relevant data on the Rule's functioning through a Freedom of Information Act (FOIA) request. The public's acquisition and analysis of such data through the FOIA process will involve the assembly and submission of FOIA requests, which in turn may require the agency to survey and compile extensive data for each such request. Thereafter parties will have to take stock of any data acquired through FOIA before being in a position to give informed feedback on the Rule. This process could take far more than the 60 days provided for comment by the RFI. Indeed, during the 2014 rulemaking process leading up to the Election Rule, the Chamber of Commerce, well into the 60-day comment period, sought an extension to give it more time to both request and analyze FOIA data. While it was ultimately determined that the comment period should not be extended under the circumstances at the time, the Chamber's effort highlights the relevance of FOIA data and the time-intensiveness of parties' analysis of such data. My colleagues' failure to allot time to account for the parties' information-gathering process only confirms that the RFI is not designed

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[9] The majority makes the odd suggestion that the RFI—a measure directed to the general public—is somehow also the most effective way to obtain information from the General Counsel. This is nonsensical. The General Counsel supervises the Board's representation proceedings under a delegation of authority from the Board, and the Board is obviously able to direct the General Counsel to provide whatever relevant information it requests, without issuing an RFI or initiating a rulemaking.

In any event, although I was not a participant in the earlier rulemaking process, it is clear from the Notice of Proposed Rulemaking that the Board based its proposals on a thorough, pre-rulemaking analysis of relevant data and agency experience that enabled it to seek public comment on specific, carefully-crafted policy proposals. In short, the Board did its homework before seeking public participation. The majority's current effort is utterly lacking the same foundation. The majority curiously seems to view this as an *attribute*, rather than a manifest departure from the norms of rulemaking under the Administrative Procedure Act.

to solicit and yield well-informed responses that might genuinely assist the Board's evaluation of the Rule.

II. *The RFI is a transparent effort to manufacture a justification for revising the Rule.*

As emphasized, I fully support the notion that the Board should take care to ensure that its rules and regulations are serving their intended purposes. I would welcome a genuine opportunity to receive and review meaningful information on the Rule's performance at an appropriate time. But this hurried effort to solicit a "show of hands" of public opinion without the benefit of meaningful data (or even thoughtfully framed points of inquiry) bears none of the hallmarks of a genuine effort at regulatory review.[10] Gathering useful information is demonstrably not the purpose of this RFI. Instead, this RFI is a transparent effort to manufacture a justification for reopening the Rule. No legitimate justification exists.

The Supreme Court has made clear that, when an agency is considering modifying or rescinding a valid existing rule, it must treat the governing rule as the status quo and must provide "good reasons" to justify a departure from it. See *Federal Communications Commission v. Fox Television*, 556 U.S. 502, 515 (2009). Obviously, determining whether there are "good reasons" for departing from an existing policy requires an agency to have a reasonable understanding of the policy and how it is functioning. Only with such an understanding can the agency recognize whether there is a good basis for taking a new approach and explain why. Id. at 515-516. Indeed, even when an agency is only beginning to explore possible revisions to an existing rule, the principles of reasoned decision-making demand a deliberative approach, informed by the agency's own experience administering the existing rule.[11]

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[10] The majority suggests that my view that the rule has been a success thus far is just one "opinion," and that they are merely soliciting a wider range of opinions from the public to better assess the Rule. But the fact that public opinion on the Rule may be divided—as it was during and after the rulemaking process—is not a reason for the Board to revisit the Rule. Canvassing public opinion might make sense if it were done in a manner that first gathered and considered evidence on the Rule's functioning, and framed any questions in a way that actually requested useful substantive feedback on the agency's own analysis.

But the open-ended solicitation we have here, without the benefit of data or analysis, is not a productive way to enlist public opinion. As the dissenters to the Election Rule observed, including Chairman Miscimarra, the rulemaking was of "immense scope and highly technical nature," and it generated "an unprecedented number of comments, espousing widely divergent views." 79 Fed. Reg. 74430, 74459. It is accurate to say that the Rule is both comprehensive and technical, and that the public holds polarized views thereon. Yet now the majority broadly seeks public opinion on the fate of the Rule without offering any data or analysis of its own to provide a foundation for the public's assessment. Ultimately, they provide no persuasive explanation of how soliciting public input in the absence of any agency analysis or proposals—input that, as noted, is tantamount to a "thumbs up or thumbs down" movie review—will provide a foundation for an effective rulemaking process.

[11] See, e.g., Dept. of Labor, Wage and Hour Div., *Request for Information on the Family and Medical Leave Act of 1993*, 71 Fed. Reg. 69504, 69505-06, Dec. 1, 2006 ("[T]he subject matter areas [of this RFI] are derived from comments at … stakeholder meetings and also from (1)

If this RFI asked the public specific, well-crafted questions geared toward a neutral assessment of the Rule's functioning—and was based on a foundation of internal evidence or experience suggesting there was a problem with the Rule's implementation thus far—there would be far less basis to doubt the majority's reasons for revisiting it.[12] Indeed, the majority's reticence to focus this inquiry on the agency's own data—the most straightforward source of information about how the Rule is working—is puzzling. The majority's failure to take this basic step suggests that they would rather not let objective facts get in the way of an effort to find some basis to justify reopening the Rule. Hence the majority instead poses the vague questions in this RFI, which belie any "good reasons" for revisiting the Rule.

Further, in the preamble to this RFI the majority has failed to identify, much less establish, any "good reasons" to revisit or to consider reopening the Rule at this time. The majority summarily cites congressional votes, hearings, and proposed (but never-passed) legislation as reasons to issue this RFI. Although such congressional actions might raise concern over a rule's actual effectiveness in other circumstances, here—where criticism was leveled in the absence of any meaningful experience under the Rule—they seem to signify little more than partisan opposition to the Rule.[13] Reasoned decision-making is not a matter of partisanship.

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rulings of the Supreme Court of the United States and other federal courts over the past twelve years; (2) the Department's experience in administering the law; and (3) public input presented in numerous Congressional hearings and public comments filed with the Office of Management and Budget … in connection with three annual reports to Congress regarding the Costs and Benefits of Federal regulations in 2001, 2002, 2004. … During this process, the Department has heard a variety of concerns expressed about the FMLA."); cf. Dept. of Labor, Wage and Hour Div., *Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 Fed. Reg. 34616, July 26, 2017 (rule enjoined by court, and Department faced with legal questions concerning its analysis and justification for aspects of rule).

[12] Indeed, if it were properly founded in objective data indicating significant problems with the rule in its implementation, I might well join such an effort to assess the effectiveness of the Rule, as I subscribe to the view that timely, informed public input can be vital to making good public policy. In contrast, my colleagues in the majority seem to take the view that soliciting the views of the public is good only when it furthers their predetermined purposes. In a recent Board decision where public input would have had a far greater likelihood of aiding the Board's decision-making process, they nonetheless dismissed the possibility that such input might be useful in order to more hastily issue a decision reversing Board precedent. See *UPMC*, 365 NLRB No. 153 (2017). In that case, the public's own experiential data and legal and policy arguments would have had immediate relevance; yet the Board took the drastic step of reversing precedent without the benefit of such. It seems clear that they seek public input here, however heedlessly, so that they can point to negative public feedback about the rule as an (inadequate) procedural precursor to justify reopening the rulemaking process under the APA; whereas in *UPMC* the adjudicative reversal of precedent did not require the same procedural formality, and thus they took a more expedient route to accomplish their goal in that case.

[13] Similarly, the unfounded criticism of the Rule as it was adopted, both among its legal challengers and the Board members who dissented from the Rule, is not a sound basis for this

The majority also asserts that "numerous" cases litigated before the Board have raised "significant" issues concerning its application. Of course, many issues concerning the proper interpretation and application of the Rule can and should be resolved in adjudication, where they arise. In fact, the four recent cases the majority cites involved case-specific applications of the Rule that offer little if any insight into how well the Rule is working overall.[14] More broadly, as stated, all legal challenges to the Rule have been soundly rejected by the courts.

Last, although not mentioned by the majority, no one has petitioned the Board to revisit the Rule or for new rulemaking on the Board's election processes. Perhaps the absence of such a petition is attributable to all of the circumstances described above. Perhaps it is explained by the common-sense notion that the Agency's and the public's limited experience with the Rule would make such a petition glaringly premature. See 5 U.S.C. §553(e).[15]

RFI. As the United States District Court for the District of Columbia made clear in rejecting a challenge to the Rule: "[The Rule's challengers'] dramatic pronouncements are predicated on mischaracterizations of what the Final Rule actually provides and the disregard of provisions that contradict plaintiffs' narrative. And the claims that the regulation contravenes the NLRA are largely based upon statutory language or legislative history that has been excerpted or paraphrased in a misleading fashion. Ultimately, the statutory and constitutional challenges do not withstand close inspection." *Chamber of Commerce v. NLRB*, supra, 118 F. Supp. 3d at 177. That court further pointed out that rhetoric like "quickie election," employed by the Rule's challengers and borrowed from the Board members who dissented from the Rule, were part of a vague, conclusory, and argumentative set of attacks. Id. at 189.

[14] If any conclusion can be gleaned from these four cases, it is that they were processed in just the manner contemplated by the Rule: fostering efficiency while preserving the fairness of the proceedings. For example, in *UPS Ground Freight*, 365 NLRB No. 113 (2017), the employer complained about the conduct and timing of a pre-election hearing, but it did not establish any prejudice to its ability to fully make its arguments. In other words, the procedures under the Rule were prompt and resulted in no unfairness. In *Yale University*, 365 NLRB No. 40 (2017), and *European Imports*, 365 NLRB No. 41 (2017), the Board refused to stay an election, but allowed parties to preserve their pre-election claims—thus leaving the substantive legal claims intact, while making the process more efficient by deferring resolution until after the election, at which time the election results may have mooted those claims. In *Brunswick Bowling*, 364 NLRB No. 96 (2016), the Board emphasized the importance of position statements, which were intended under the Rule to narrow the issues for pre-election hearings, but also noted that a party's failure to file one did not affect a regional director's independent statutory duties with respect to representation petitions.

In any event, a better measure of the Rule's early effectiveness, which I advocate for below, would be a thorough internal Agency review of all the cases processed under the Rule, including those that have *not* come before the Board.

[15] Indeed, another argument to defer any examination of the Rule's effectiveness until a later date is that a longer timeframe would yield a larger body of cases that presumably would provide more representative and meaningful insights into its performance.

The only remaining asserted justification for considering revisiting the Rule at this early stage is the majority's express reliance on the change in the composition of the Board.[16] This certainly is not a "good reason" for revisiting a past administrative action, particularly in the context of rulemaking. See generally *Motor Vehicles Manufacturers v. State Farm*, 463 U.S. 29 (1983). Yet, I fear this is the origin of the RFI, and regrettably so. The Board has long and consistently rejected motions to reconsider its decisions based on a change in the composition of the Board. See, e.g., *Brown & Root Power & Mfg.*, 2014 WL 4302554 (Aug. 29, 2014); *Visiting Nurse Health System, Inc.*, 338 NLRB 1074 (2003); *Wagner Iron Works*, 108 NLRB 1236 (1954). We should continue to exercise such restraint with respect to the Rule, unless and until a day comes when we discover or are presented with a legitimate basis for taking action. Today, however, is manifestly not that day.

As a result, it should come as no surprise to the majority if a court called upon to review any changes ultimately made to the Rule looks back skeptically at the origins of the rulemaking effort. The RFI is easily viewed as simply a scrim through which the majority is attempting to project a distorted view of the Rule's current functioning and thereby justify a partisan effort to roll it back. Cf. *United Steelworkers v. Pendergrass*, 819 F.2d 1263, 1268 (3d Cir. 1987) ("Some of the questions [in an ANPRM] could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident."). Such opportunism is wholly inconsistent with the principles of reasoned Agency decision-making. It is equally inconsistent with our shared commitment to administer the Act in a manner designed to fairly and faithfully serve Congressional policy and to protect the legitimate interests of the employees, unions, and employers covered by the Act. Whatever one thinks of the Rule, the Agency, its staff, and the public deserve better.

VI. Conclusion

The Board invites interested parties to submit responses during the public response period and welcomes pertinent information regarding the above questions.

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board

[16] I reject the majority's implied suggestion that *my* joining the Board since the Rule was enacted somehow supports today's effort to revisit the Rule. I begin with the proposition that the Rule, promulgated under notice-and-comment and upheld by the courts, is governing law—whether or not particular Board members disagreed with its adoption or would have disagreed, had they been on the Board at the time. As explained, I would support revisiting the Rule only if there were some reasoned basis to do so.

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 07-27 **December 27, 2006**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Non-Board Settlements

Settlements are vital to effectuating the Act. While Regions should always seek to obtain an informal or, where appropriate, a formal settlement agreement, non-Board adjustments, which are agreements between the parties that result in the withdrawal of the charge, have always been an important settlement tool. In the past few years, in fact, the percentage of non-Board adjustments has been growing. For FY 2006, about 80 percent of the Agency's pre-complaint settlements and about 46 percent of the post-complaint settlements were non-Board adjustments.[1] During the period FY 2003 to FY 2006, the percent of non-Board adjustments grew by about 10 percent.[2] In view of the prominence of non-Board adjustments in the settlement universe, Regions should follow the principles set forth in this memorandum to ensure that non-Board adjustments comply with all applicable standards and consistent review standards are applied by all Regions.[3]

In *Independent Stave Co.*, 287 NLRB 740 (1987), the Board reconfirmed that the Board's jurisdiction over settlement agreements requires it to enforce public interests, not private rights, and to reject private settlements that are repugnant to the Act or Board policy. Id. at 741. At the same time, the Board

[1] For FY 2003, about 74 percent of pre-complaint settlements and about 39 percent of post-complaint settlements were non-Board adjustments. For FY 2004, 75 percent of pre-complaint settlements and about 42 percent of post-complaint settlements were non-Board adjustments. For FY 2005, 81 percent of pre-complaint settlements and about 46 percent of post-complaint settlements were non-Board adjustments.

[2] In FY 2003, non-Board adjustments represented about 59 percent of total settlements. In FY 2004, 2005 and 2006, those figures were about 62, 70 and 70 percent, respectively.

[3] The work of the Quality Committee in the preparation of this memorandum is acknowledged. Members of this Committee are Rosemary Pye, RD, R-1; Rochelle Kentov, RD, R-12; Martha Kinard, RD, R-16; Robert W. Chester, RD, R-18; Karen Fernbach, RA, R-2; Dorothy D. Wilson, RA, R-26; Claude T. Harrell, ARD, R-10; Andrew Young, SCO, R-32; James G. Paulsen, AGC, Operations-Management.; and Charles L. Posner, DAGC, Operations-Management. The assistance of Gerald Kobell, RD, R-6, is also acknowledged.

also acknowledged its policy of encouraging settlement agreements. Based on its historical treatment of non-Board adjustments, the Board identified a non-exclusive list of factors to consider: (1) whether the settlement is reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; (2) whether the charging party, the respondent, and the discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (3) whether fraud, coercion, or duress were present; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. Id. at 743. Agency policy with respect to non-Board adjustments also appears at Casehandling Manual (CHM) Sections 10140 through 10142.5.

Although the General Counsel has considerable discretion in approving non-Board adjustments, it is essential that the Regions reject settlements that are repugnant to Board law and policy. Presently, there is no explicit Agency-wide policy regarding the inclusion of broad waivers, releases, and confidentiality clauses in non-Board adjustments.[4] These types of provisions, which also often resolve other actual and potential claims, are appearing with increasing frequency in non-Board adjustments. Because of the significant impact these provisions may have on Section 7 rights and because they are appearing with increased frequency in non-Board adjustments, it is necessary for the General Counsel to adopt core standards on these issues. This is particularly true because law firms, employers, and unions appear before multiple Regions. If these policy standards are known to the staff and the public in advance of the negotiation of the non-Board adjustments, it is less likely that the parties will present the Regions with non-Board adjustments that are repugnant to the Act or are otherwise unacceptable to the Regions. It is easier to maintain standards publicized in advance than to undo settlements that have already been reached, particularly when those settlements represent a complex balancing of interests.

To exercise proper review,[5] the Board agent should obtain the terms of the non-Board adjustment in writing.[6] The Board agent should also obtain the

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[4] Section 10142 of the CHM states: "In those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in private negotiations." In addition, Section 10564.8 of the CHM provides that a Region must seek approval from Operations-Management to accept a settlement, including a non-Board settlement, that appears to provide "for more than 100 percent backpay as an inducement to discriminatees to waive reinstatement."

[5] In the review of non-Board adjustments, it is appropriate to differentiate between cases where there is only the potential for a determination of merit and cases where complaint has already been authorized. Although Regions should always reject settlements that are repugnant to Board law and policy, there should be closer scrutiny of cases where a merit determination has already been made.

[6] See CHM Section 10120.4, which requires obtaining the details of an adjusted withdrawal.

position of any alleged discriminatees and any other individuals or entities who may be adversely affected by approval of the request for withdrawal of the charge. It is not necessary to determine the position of the charged party.[7]

While the Region must know the basis upon which to consider the withdrawal of a charge, there is a delicate balance between making comments about the acceptability of certain proposals in a settlement and negotiating an agreement on behalf of the charging party. Thus, when a Board agent learns that the parties are negotiating what is clearly a non-Board settlement it is essential that the agent make clear that the Agency will not be a party to a non-Board adjustment, that the Agency is not endorsing the non-Board settlement and that the agent's comments are limited to addressing the issue of whether the Regional Director will approve a withdrawal based on the settlement. It should also be made clear that the Agency cannot enforce the terms of a non-Board adjustment in the event of noncompliance.

To develop core standards, we have identified the following, non-exhaustive concerns about clauses that arise frequently in non-Board adjustment situations: (1) waiver of the right to file NLRB charges on future unfair labor practices and on future employment; (2) waiver of the right to assist other employees in the investigation and trial of NLRB cases; (3) confidentiality clauses and clauses that prohibit an employee from engaging in non-defamatory talk about the employer; (4) penalties for breach of agreement requiring the return of backpay and assessing costs and attorneys' fees; and (5) the tax treatment of settlement payments.

(1) <u>Waiver of the Right to File NLRB Charges on Future Unfair Labor Practices and on Future Employment</u>

Generally, the Board has held that an employer violates the Act when it insists that employees waive a statutory right to file charges with the Board.[8] On the other hand, an employer does not violate the Act when, in exchange for sufficient consideration, such as backpay, the employer insists that a discriminatee sign a release waiving claims arising prior to the date of the execution of the release.[9]

While the release of future rights raises serious questions about an employee's future access to the Board, a party has a legitimate interest in settling the current claims filed against it. However, there is no legitimate interest in limiting an employee's rights with respect to matters arising after the execution of

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[7] See CHM Section 10120.6 on obtaining the positions of the parties.

[8] See, e.g., *Athey Products Corp.*, 303 NLRB 92, 96 (l991).

[9] See, e.g., *First National Supermarket*, 302 NLRB 727 (l991).

the release. An employee is not in a position to evaluate whether the compensation being received as part of the settlement is of fair value when compared to the rights that he/she is being asked to waive. When the parties to a case reach a non-Board adjustment, a Regional Director plays a critically important role in deciding whether approval of a withdrawal request will effectuate the purposes of the Act. If the non-Board adjustment contains a release that waives future rights, i.e., rights that do not predate the execution of the release, a Regional Director should inform the parties that such a release of future rights will prevent the Director from approving the withdrawal request because such a waiver of future rights would unlawfully preclude an employee from having access to the Board with respect to unknown future unlawful conduct. Generally, Regional Office experience has shown that when this issue has been raised with the parties to a non-Board adjustment, the parties will adjust the language so that any waiver of future rights is deleted from the release. This practice is critically important to protecting the statutory right of employees to have access to and file charges with the Board.

One exception to the rule of prohibiting waivers of future rights is a release in which an employee gives up his right to seek future employment with the employer with whom he/she is signing a release resolving current claims. Such a waiver clearly involves releasing future rights, but it does not squarely implicate the right to file a charge with the Board. While the waiver of these future employment rights should be discouraged, the employee is in a position to evaluate whether he/she wishes to give up his right to work for the employer in the future.

In such circumstances, however, if the employee-party to the non-Board adjustment is not represented by counsel, the Region should ask the employee whether he understands the implications of the waiver of future employment rights and wishes to waive this particular future right. In some circumstances, a future employment waiver may become a serious impediment to an employee if the employer involved in the case operates in different locations and the employer would be the most frequent source of the employee's employment opportunities. Also, the release may include affiliated, subsidiary and successor employers and the employee may not understand the implications of such a waiver. Therefore, while a Board agent acts in the public interest and is not a representative of an individual discriminatee, the Regional Director should ensure that an unrepresented employee is aware of what he or she is giving up by signing a waiver releasing the right to seek future employment with the named employer.

(2) <u>Waiver of Right to Assist Other Employees in the Investigation and Trial of NLRB Cases</u>

Similar to the waiver of future rights, a settlement agreement that limits a discriminatee's ability to assist other employees by, for example, giving testimony

or providing evidence in support of a fellow employee, implicates critical statutory rights. A provision that restricts a discriminatee from providing assistance to other employees limits not just the Section 7 rights of that discriminatee but the Section 7 rights of other employees who are not receiving compensation under the terms of the non-Board adjustment. As such, this type of provision clearly infringes on fundamental rights under the National Labor Relations Act and should not be permitted.

(3) Confidentiality Clauses and Clauses that Prohibit an Employee from Engaging in Non-defamatory Talk about the Employer

Non-Board adjustments that contain clauses that prohibit discriminatees from generally disclosing the financial terms of a settlement continue to be appropriate. Thus, confidentiality clauses that prohibit an employee from disclosing the financial terms of the settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable. However, any prohibition that goes beyond the disclosure of the financial terms should not be approved, absent compelling circumstances. If such circumstances exist, details of these circumstances must be documented in the file. Further, any document recommending approval of the withdrawal request containing such a clause must explain why approval is warranted.

Similar to an overly broad confidentiality clause, non-Board adjustments that limit a discriminatee's ability to engage in discussions with other employees that include non-defamatory statements about the employer severely limits an employee's right to engage in concerted protected speech. Such a restriction on the Section 7 rights of an employee is repugnant to the purposes and policies of the Act. Therefore, Regions should not approve a withdrawal request where the non-Board adjustment prohibits the discriminatee from engaging in non-defamatory speech about the employer.

(4) Penalties for Breach of Agreement Requiring the Return of Backpay and Assessing Costs and Attorneys' Fees

Increasingly, counsels for charged parties are including in non-Board adjustments unduly harsh penalties in the event the charging party or discriminatee breaches the agreement in any way. Such penalties often include the immediate return of backpay, frequently with interest. They often also provide that in the event of a breach, the charging party or discriminatee must pay all costs and expenses, including attorneys' fees, if the charged party files suit to enforce the terms of the agreement, or incurs damages or expenses by virtue of its having to defend itself against new charges that were prohibited by the agreement.

Although charged parties argue that such penalties are necessary to ensure that the charging party and discriminatees adhere to the agreement, inclusion of such penalties is inappropriate. Non-Board adjustments sometimes

contain vaguely worded and/or overly expansive language and the issue of whether they have been breached may be subject to interpretation and unnecessary and costly post settlement litigation. Consequently, inclusion of such penalties may inhibit charging parties and discriminatees from engaging in otherwise legitimate, protected activity because of fear that such activity might be construed as violating the agreement, resulting in severe financial consequences. That inhibition is clearly contrary to the public interest and to the purposes and policies of the Act. However, a provision that seeks damages that are directly related to the breach of the agreement would not be considered an unduly harsh penalty.

(5) Tax Treatment of Settlement Payments

The Act provides for remedial backpay and interest to make whole losses caused by unlawful conduct. Long-established policy provides that backpay paid as the result of an unfair labor practice proceeding be treated as wages for tax purposes, and that interest be treated as non-wage taxable income. See CHM 10637. This policy is consistent with U.S. tax law and regulations.

Regions are consistently obtaining backpay and interest paid in informal settlement agreements and formal compliance cases in a manner that correctly meets tax requirements. As a result of correctly classifying backpay, appropriate amounts are withheld for income and social security taxes. In approving non-Board adjustments, Regions should not allow parties to avoid proper tax treatment of settlement payments. For example, the parties may claim that the settlement payment is non-wage income or liquidated damages or otherwise not subject to taxation or withholding. Regions have broad discretion to approve non-Board adjustments, particularly when proposed by the parties before a Regional determination of a pending charge. Nonetheless, approval of a settlement that claims monetary amounts to be non-taxable when they are clearly in lieu of wages is inconsistent with the Agency's responsibility to correctly apply federal laws.

Regions should routinely confirm with the parties how settlement payments will be treated for tax purposes in proposed non-Board adjustments. Whenever the parties propose to treat settlement payments as anything other than wages and interest, or to report payments in a manner that appears to be inappropriate for tax purposes, Regions should advise the parties that backpay awards in unfair labor practice proceedings should be treated as wages and interest, and reported in accordance with the requirements of federal, state, and local tax requirements, including, in particular, making Social Security (FICA) contributions and payroll tax deductions from any wage payments.

The parties should also be advised that although interest is to be paid in addition to backpay, allocation of a settlement payment between backpay and interest should be based upon a reasonable assessment of interest due on

backpay, and not skewed toward interest as a means of reducing taxes and withholding.

Finally, Regions should advise all parties to a non-Board adjustment that although the Region has no authority to determine proper taxes on settlement payments or otherwise enforce tax obligations, the parties are responsible to tax agencies with regard to reporting and tax treatment of settlement payments.

Although a Region's decision to approve the withdrawal of an unfair labor practice charge as the result of a non-Board adjustment will depend upon all circumstances, Regions should generally refuse to approve a withdrawal request if the parties have clearly failed to treat the monetary remedy properly for tax purposes.

Summary of Principles

In summary:

1. Regions should not approve non-Board adjustments that include a provision requiring an employee to release future rights, with the exception that an employee may knowingly waive the right to seek employment with a named employer in the future.
2. Regions should not approve non-Board adjustments that prohibit a discriminatee from providing assistance to other employees.
3. Absent special circumstances, Regions should not approve a withdrawal request based on a non-Board adjustment that prohibits a discriminatee from engaging in discussions about the employer or the terms of the settlement with other employees, except that defamatory statements my be prohibited. However, the non-Board adjustment may contain a provision limiting the disclosure of the amount of money received pursuant to the terms of the non-Board adjustment.
4. Non-Board adjustments should not include language that specifies unduly harsh penalties for breach of the agreement such as repayment of backpay or a requirement that the charging party or discriminatee pay attorneys' fees or costs for enforcing the agreement. A provision that seeks damages that are directly related to the breach of the agreement would not be considered an unduly harsh penalty.
5. Regions should refuse to approve a withdrawal request based on a non-Board adjustment that appears to violate tax laws or regulations.

Conclusion

Approving withdrawals in a non-Board adjustment often presents difficult choices for a Region, particularly if the non-Board adjustment includes some of the issues described in this memorandum. The final judgment must be left to the Regional Director to determine whether it is more appropriate, within these guidelines, to approve the withdrawal or to proceed to trial with an uncooperative charging party or witnesses. Therefore, Regional Directors have the discretion to consider and apply these core standards, and, if appropriate, consult with Operations-Management, and to exercise their best judgment in deciding whether to approve the withdrawal request and accept the non-Board adjustment.

If you have any questions regarding this memorandum, please contact your AGC or Deputy or the undersigned.

/s/
R.A.S.

cc: NLRBU
Release to the Public